Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 22 NOVEMBER 16, 1988 No. 46

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 113

(T.D. 88–46)

CUSTOMS REGULATIONS AMENDMENTS CONCERNING ACCESS TO CUSTOMS SECURITY AREAS AT AIRPORTS; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In Federal Register Document 88–17439, published on August 3, 1988 (53 FR 29228), the Customs Regulations were amended relating to access to Customs security areas at airports. On page 29230, third column, it was stated that "Section 113.64 is amended by redesignating paragraph (d) as paragraph (e) and adding a new paragraph (d) to read as follows:" it should have read "Section 113.64 is amended by redesignating paragraphs (d) and (e) as paragraphs (e) and (f) and adding a new paragraph (d) to read as follows:"

FOR FURTHER INFORMATION CONTACT: Arnold Sarasky, Office of Regulations and Rulings (202–566–8237).

Dated: October 26, 1988.

JOHN E. ELKINS,
Acting Director,
Regulatory Procedures and Penalties Division.

[Published in the Federal Register, November 2, 1988 (53 FR 44186)]

U.S. Customs Service

General Notice

19 CFR Part 111

ANNUAL USER FEE FOR CUSTOMS BROKERS' PERMIT

AGENCY: U.S. Custom Service, Department of the Treasury.

ACTION: Notice of due date of broker's user fee.

SUMMARY: This document advises Customs brokers that for 1989 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association, or corporate broker is due by January 3, 1989. This announcement is being published to comply with the Tax Reform Act of 1986.

DATE: Date of notice: November 2, 1988. Due date for fee: January 3, 1989.

FOR FURTHER INFORMATION CONTACT: Raymond Janiszewski, Chief, Broker Compliance and Evaluation Branch (202) 535-4161.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272) established that an annual user fee of $125 is to be assessed for each customs broker's permit held by an individual, partnership, association or corporate broker. This fee is set forth in the Customs Regulations in § 111.96 (19 CFR § 111.96).

Section 111.96, Customs Regulations, provides that the fee is payable for each calendar year in each district where a broker has a permit to do business by the due date, which will be published in the Federal Register annually.

Section 1893 of the Tax Reform Act of 1986 (Pub. L. 99-514), provides that notice of the date on which payment is due of the user fee for each broker permit shall be published by the Secretary of the Treasury in the Federal Register by no later than 60 days before such due date.

This document notifies brokers that for 1989 the due date for payment of the user fee is January 3, 1989. It is expected that annual user fees for brokers for subsequent years will be due on the first of January each year.

Dated: October 26, 1988.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, November 2, 1988 (53 FR 44186)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4, 101, 123, 148

CUSTOMS REGULATIONS AMENDMENTS CONCERNING REPORTING REQUIREMENTS FOR VESSELS, VEHICLES AND PERSONS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to implement recent legislative changes to enhance Customs enforcement of the current reporting and controlled substances laws and assist in preventing the importation of merchandise contrary to law. The statutory changes concern the reporting procedure for vessels, vehicles and persons, departure from the reporting locations and the penalties for the violation thereof. They provide that the arrival of those entities must be immediately reported to Customs at the reporting locations, and that permission must be obtained to depart those locations. In addition to the reporting requirements, the amendments also inform the public of legislative provisions which provide for civil and criminal monetary penalties and for the seizure and forfeiture of conveyances used in violation of the arrival and departure requirements.

DATE: Comments must be received on or before January 3, 1989.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: (Operational matters) Sam McLinn, Office of Passenger Enforcement and Facilitation (202)-566-5607, (Legal matters) Larry L. Burton, Carrier Rulings Branch (202)-566-5706, or (Penalty matters) Jeremy Baskin, Penalties Branch (202)-566-5746.

SUPPLEMENTARY INFORMATION:

Background

The Anti-Drug Abuse Act of 1986 (Pub. L. 99–570) (the Act), made various changes to the Tariff Act of 1930 relating to the arrival in the U.S. and the reporting to Customs by persons and of transportation conveyances; penalties; search and seizure of persons and conveyances; forfeiture and disposition of articles and conveyances; the Customs Forfeiture Fund; aviation smuggling; preclearance; investigative matters such as records production; undercover Customs operations; informer compensation; and the exchange of information with foreign Customs and law enforcement agencies. The reporting requirements for conveyances are consolidated in § 433, Tariff Act of 1930, as amended (19 U.S.C. 1433), which provides, in pertinent part, that vessels and vehicles must immediately report their arrival at a designated Customs facility, comply with arrival and entry formalities and remain at that location until granted permission to depart from the arrival point. It also provides that a vessel or vehicle may only discharge any passenger or merchandise (including baggage) in accordance with regulations prescribed by the Secretary of the Treasury. In connection therewith, the Act has amended § 401(k), Tariff Act of 1930, as amended (19 U.S.C. 1401(k)), to clarify that a vessel arriving in the U.S. after visiting a hovering vessel or a point or place where it has received merchandise is deemed to be arriving from a foreign port or place and that controlled substances are generally to be considered as prohibited merchandise.

The Act further amended § 459, Tariff Act of 1930, as amended (19 U.S.C. 1459), to provide that individuals arriving in the U.S., by whatever means, must immediately report their arrival at one of the designated arrival points. This alters the prior provision under which only persons importing or bringing merchandise into the country needed to report, and requiring that they needed only to report to the port of entry or customhouse nearest to the point they crossed the border. It also places a reporting obligation on the individuals arriving by a conveyance in addition to the reporting requirement already placed on the master, person in charge of a vehicle, or aircraft pilot.

The regulations would permit the district director to provide alternate means of reporting the arrival of persons and conveyances. They would also permit the district director to change the reporting locations and hours of service and to otherwise specify local arrival and reporting requirements. The district director would make this information available to interested parties by posting in appropriate Customs offices, publication in a newspaper of general circulation in the Customs district that supervises the particular location, and other appropriate means.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as defined in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Cargo vessels, Coastal zone, Customs duties and inspection, Fishing vessels, Freight, Harbors, Imports, Maritime carriers, Reporting and recordkeeping requirements, Seamen, Vessels and Yachts.

19 CFR Part 101

Customs duties and inspection, Harbors, Imports, Organization and functions (Government agencies), Seals and insignia.

19 CFR Part 123

Canada, Customs duties and inspection, Freight, Imports, International boundaries, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, and Vessels.

19 CFR Part 148

Airmen, Alcohol and alcoholic beverages, Customs duties and inspection, Foreign officials, Government employees, Household

goods, Imports, International organizations, Military personnel, Motor vehicles, Seamen, Tobacco, and Taxes.

PROPOSED AMENDMENTS

It is proposed to amend Part 4, Customs Regulations (19 CFR Part 4), as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific authority for §§ 4.80, 4.82, 4.83 and 4.94 would be revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Headnote 11), 1624, 46 U.S.C. 3, 2103

§ 4.80 also issued under 46 U.S.C. 13, 251, 289, 319, 802, 808, 883, 883-1, 12122;

§ 4.82 also issued under 19 U.S.C. 293, 294; 46 U.S.C. 123, 12107;

§ 4.83 also issued under 46 U.S.C. 91, 111, 123, 12107;

§ 4.94 also issued under 19 U.S.C. 1433, 1434, 1435, 1441; 46 U.S.C. 91, 104, 313, 314;

2. It is proposed to amend Section 4 by adding new paragraphs (f) and (g) to § 4.0, to read as follows:

§ 4.0 Definitions.

* * * * * * *

(f) *Arrival of a vessel.* The term "arrival of a vessel" means that time when the vessel first comes to rest, whether at anchor or at a dock, in any harbor within the Customs territory of the U.S.

(g) *Departure of a vessel.* The term "departure of a vessel" means that time when the vessel gets under way on its outward voyage and proceeds on the voyage without thereafter coming to rest in the harbor from which it is going.

3. It is proposed to revise section 4.2 to read as follows:

§ 4.2 Reports of arrival of vessels.

(a) Upon arrival in any port or place within the U.S., including, for purposes of this section, the U.S. Virgin Islands, of any vessel from a foreign port or place, any foreign vessel from a port or place within the U.S., or any vessel of the U.S. carrying bonded merchandise or foreign merchandise for which entry has not been made, the master of the vessel shall immediately report that arrival to the nearest Customs facility or other location designated by the district director. The report of arrival, except as prescribed in § 4.2a of this Part, or as supplemented in local instructions issued by the district director and made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation, and other appropriate means, shall be made by any means of communication to the district director or to a Customs officer assigned to board a vessel. The Customs officer may require the production of

any documents or papers deemed necessary for the proper inspection/examination of a vessel, cargo, passenger, or crew.

(b) For purposes of this Part, "foreign port or place" includes a hovering vessel (defined in 19 U.S.C. 1401(k)) and any point in Customs waters beyond the territorial sea or the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise.

(c) In the case of vessels described in § 441(4), Tariff Act of 1930, as amended, the report may be filed by either the master, owner, or agent, and shall be in the form and give the information required by that statute, except that the report need not be under oath. A derelict vessel shall be considered one in distress and any person bringing it into port may report its arrival.

(d) The report of baggage and merchandise on a vessel within the purview of § 441(2), Tariff Act of 1930, as amended, shall be made as provided for in that section and shall be in addition to the required report of arrival.

4. It is proposed to amend Section 4.2a(b) by deleting paragraph (1) and by renumbering the current paragraphs (2) and (3) as (1) and (2) respectively. Section 4.2a(b) as amended will read as follows:

§ 4.2a Small vessel reporting of arrival, Miami district.

* * * * * * *

(b) *Definitions.* For purposes of this section:

(1) "*Small vessel*" includes any vessel of less than 5 net tons, and any private pleasure vessel, regardless of displacement.

(2) "*Arrival of a vessel*" occurs when a small vessel comes to rest within the waters of the Miami District, whether at anchor or at a dock, in any harbor or other location.

* * * * * * *

5. It is proposed to amend Section 4.3 by revising paragraph (a) and (b) to read as follows:

§ 4.3 Vessels required to enter.

(a) Except as specified in § 441, Tariff Act of 1930, as amended, R.S. 2792, or R.S. 2793, as amended, or as otherwise specified in this part, every American vessel arriving in the U.S. from a foreign port or place and every foreign vessel arriving at a port in the U.S. from another such port or from a foreign port or place shall make entry at the customhouse within 48 hours after arrival in accordance with § 4.9.

(b) For the purposes of the vessel entry requirement in this section and § 4.9, a "foreign port or place" includes a hovering vessel (defined in 19 U.S.C. 1401(k)) and any point in the Customs waters beyond the territorial sea or the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise, or a vessel on the high seas when the vessel arriving in the U.S. is re-

turning from the vessel on the high seas after having transported export merchandise out of the U.S. to the vessel on the high seas and there transshipped the merchandise to that vessel.

* * * * * * *

6. It is proposed to amend Part 4 by adding a new § 4.3a to read as follows:

§ 4.3a Vessel entry violation penalties.

Violation of the entry requirements in this section, or the report of arrival requirements in § 4.2, results in the master being subject to civil penalties in the amount of $5000 for the first violation and $10,000 for each subsequent violation, and any conveyance used in connection with any such violation is subject to seizure and forfeiture. The master is also subject to civil penalties in an amount equal to the value of merchandise (other than sea stores) imported or brought into the U.S. in or on board the vessel which was not properly reported or entered and the merchandise may be seized and forfeited unless properly entered by the importer or consignee. In addition to these civil penalties, the master is, upon conviction, subject to criminal penalties consisting of a fine of not more than $2000 or imprisonment for 1 year, or both, for intentionally violating these provisions. If the vessel has or is discovered to have had on board any merchandise (other than sea stores) the importation of which in to the U.S. is prohibited, the master shall be subject to an additional fine of not more than $10,000 or imprisonment for not more than 5 years, or both (19 U.S.C. 1436).

7. It is proposed to revise Section 4.6 to read as follows:

§ 4.6 Departure or unlading before report or entry.

(a) No vessel which has arrived within the limits of any Customs district from a foreign port or place shall depart or attempt to depart, except from stress of weather or other necessity, without reporting and making entry as required in this Part. These requirements shall not apply to vessels merely passing through waters within the limits of a Customs district in the ordinary course of a voyage, except for those arriving in the U.S. otherwise than by sea which are provided for in Part 123 of this chapter.

(b) The "limits of any Customs district" as used herein are those defined in § 101.1(b) of this chapter, including the marginal waters of the 3–mile limit on the seaboard and the waters to the boundary line on the northern and southern boundaries.

(c) For purposes of this section, "foreign port or place" includes a hovering vessel (defined in 19 U.S.C. 1401(k)) and any point in Customs waters beyond the territorial sea or the high seas at which a vessel arriving in a port or place in the U.S. has received merchandise.

(d) Violation of this provision shall result in the master being subject to a penalty of $5,000 for the first violation and $10,000 for

each subsequent violation and the vessel to arrest and forfeiture (19 U.S.C. 1585).

8. It is proposed to amend Section 4.9 by revising paragraph (a) and by adding a new paragraph (f) to read as follows:

§ 4.9 Formal entry.

(a) Section 4.3 provides which vessels are subject to formal entry and which are exempt from formal entry requirements. The formal entry of an American vessel from a foreign port or place (see § 4.3(b) of this Part) shall be in accordance with § 434, Tariff Act of 1930 (19 U.S.C. 1434). The term "American vessel" means a vessel of the United States (see § 4.0(b)), as well as, when arriving by sea, a vessel entitled to be documented except for its size (see § 4.0(c) of this Part). (For vessels of less than 5 net tons arriving otherwise than by sea, see Part 123 of this Chapter). The formal entry of a foreign vessel arriving within the limits of any Customs district shall be in accordance with § 435, Tariff Act of 1930 (19 U.S.C. 1435). The required oath on entry shall be executed on Customs Form 1300.

* * * * * * *

(f) Any master or person in charge of a vessel who fails to make entry as required by this section or who presents any document required by this section which is forged, altered, or false, shall be liable for a civil penalty of $5,000 for the first violation and $10,000 for subsequent violations. Furthermore, a vessel used in connection with any such violation is subject to seizure and forfeiture as provided in 19 U.S.C. 1436.

9. It is proposed to revise section 4.30(a) to read as follows:

§ 4.30 Permits and special licenses for unlading and lading.

(a) Except as prescribed in paragraph (f), (g), or (k) of this section or in § 123.8 of this chapter, and except in the case of a vessel exempt from entry and clearance under 19 U.S.C. 288 no passengers, cargo, baggage, or other article shall be unladen from a vessel which arrives directly or indirectly from any port or place outside the Customs territory of the U.S., including the adjacent waters (see § 4.6 of this Part), or from a vessel which transits the Panama Canal and no cargo, baggage, or other article shall be laden on a vessel destined to a port or place outside the Customs territory of the U.S., including the adjacent waters (see § 4.6 of this Part) if Customs supervision of such lading is required, until the district director shall have issued a permit or special license therefor on Customs Form 3171.

10. It is proposed to amend section 4.50(a) to read as follows:

§ 4.50 Passenger lists.

(a) The master of every vessel arriving at a port of the United States from a port or place outside the Customs territory (see § 4.6 of this Part) and required to make entry, except a vessel arriving

from Canada, otherwise than by sea, at a port on the Great Lakes, or their connections or tributary waters, shall submit passenger and crew lists as required by § 4.7(a) of this Part. If the vessel is arriving from noncontiguous foreign territory and is carrying steerage passengers, the additional information respecting such passengers required by Customs and Immigration Form I–418 shall be included therein.

11. It is proposed to amend part 4 by adding a new section 4.51 reading as follows:

§ 4.51 Reporting requirements for individuals arriving by vessel.

(a) *Arrival of vessel reported.* Individuals on a vessel whose arrival have been reported to Customs in accordance with 19 U.S.C. 1433 and § 4.2 of this Part, shall remain on board until authorized by Customs to depart. Upon departing the vessel, such individuals shall immediately report to a designated Customs location together with all of their accompanying articles.

(b) *Arrival of vessel not reported.* Individuals on vessels whose arrival have not been reported to Customs in accordance with 19 U.S.C. 1433 and § 4.2 of this Part, shall immediately notify Customs and report their arrival together with appropriate information regarding the vessel, and shall present themselves and their accompanying articles at a designated Customs location.

(c) *Departure from designated Customs location.* Individuals required to report to designated Customs locations under this section shall not depart from such locations until authorized to do so by any appropriate Customs officer.

12. It is proposed to amend part 4 by adding a new § 4.52 reading as follows:

§ 4.52 Penalties applicable to individuals.

Individuals violating any of the provisions of 19 U.S.C. 1459 or § 4.51 of this Part, including the presentation of any forged, altered, or false document or paper to Customs in connection with those lawful provisions, shall be liable for a civil penalty of $5,000 for the first violation, and $10,000 for each subsequent violation. Additionally, such individuals convicted of intentionally violating any provisions of 19 U.S.C. 1459 are liable for a fine of not more than $5,000, or imprisonment for not more than 1 year, or both.

13. It is proposed to amend Section 4.81 by removing the phrase "within 24 hours" where it appears in the 9th sentence of paragraph (e), the 5th sentence of paragraph (g)(1) and the 4th sentence of paragraph (g)(2) and, in each instance, inserting in its place "immediately upon arrival".

14. It is proposed to amend section 4.84 by removing the phrase "shall report its arrival within 24 hours" where the phrase appears in paragraph (b) and in the first sentence of paragraph (d) and, in

each instance, inserting in its place "immediately report its arrival".

15. It is proposed to amend section 4.85 by removing the phrase "report arrival and make entry within 24 hours" where it appears in the first sentence of paragraph (c) and inserting in its place "immediately report its arrival and make entry within 48 hours".

16. It is proposed to amend section 4.87 by removing the phrase "shall report arrival within 24 hours" in the first sentence of paragraph (d) and inserting in its place "shall immediately report arrival".

17. It is proposed to amend section 4.91 by removing the phrase "report arrival within 24 hours" where it appears in the 3rd sentence of paragraph (b) and inserting in its place "shall immediately report arrival".

18. It is proposed to revise Section 4.94(a) to read as follows:

§ 4.94 Yacht privileges and obligations.

(a) Any documented vessel with a pleasure license endorsement, as well as any undocumented American pleasure vessel, shall be used exclusively for pleasure and shall not transport merchandise nor carry passengers for pay. Such a vessel which is not engaged in any trade nor in any way violating the Customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign port without clearing and is not subject to entry upon its arrival in a port of the U.S., provided it has not visited a hovering vessel, received merchandise while in the customs waters beyond the territorial sea, or received merchandise while on the high seas. Such a vessel shall immediately report arrival to Customs when arriving in any port or place within the U.S., including the U.S. Virgin Islands, from a foreign port or place.

19. It is proposed to amend section 4.94(c) by removing the last sentence and replacing it with:

(c) * * * Upon the vessel's arrival at any port or place within the U.S. or the U.S. Virgin Islands, the master shall comply with 19 U.S.C. 1433 by immediately reporting arrival at the nearest Customs facility or other place designated by the district director. Individuals shall remain on board until directed otherwise by the appropriate Customs officer, as provided in 19 U.S.C. 1459.

20. It is proposed to amend section 4.94(d) by removing in the second paragraph of the cruising license form the sentence "Such report shall be made within 24 hours, exclusive of any day on which the customhouse is not open for marine business" and replacing it with "Such report shall be immediately made."

21. It is proposed to amend part 4 by removing footnotes 15, 16, 23, 55, 56, 65, 72, 91, 95, and 98.

PART 101—GENERAL PROVISIONS

1. The general authority for Part 101 would be amended to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Headnote 11), 1624, Reorganization Plan 1 of 1965; 3 CFR 1965 Supp.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority for Part 123 would be amended to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen. Headnote 11), 1433, 1624, unless otherwise noted.

2. It is proposed to revise section 123.1 to read as follows:

§ 123.1 Report of arrival from Canada or Mexico and permission to proceed.

(a) *Individuals.* Section 1459 of title 19, United States Code (19 U.S.C. 1459), provides certain requirements for the reporting by individuals of their arrival in the U.S. Civil penalties of $5,000 for the first violation and $10,000 for subsequent violations of the requirements set forth in this paragraph are provided in § 1459, as are criminal penalties of up to $5,000 in fines and/or 1 year imprisonment upon conviction for intentionally violating the requirements. The specific requirements are as follows:

(1) Persons arriving otherwise than by conveyance may enter the U.S. only at a location or locations specified by appropriate district director. Any such persons shall immediately report their arrival to Customs. Such persons shall not depart from the Customs port or station until authorized to do so by the appropriate Customs officer.

(2) Persons aboard a conveyance the arrival of which has been reported to Customs at a location or locations specified by the appropriate district director in accordance with §§ 1433 or 1644 of title 19, United States Code (19 U.S.C. 1433, 1644), or § 1509 of title 49, United States Code (49 U.S.C. 1509), shall remain on board until authorized by Customs to depart, and shall then immediately report to the designated Customs facility together with all articles accompanying them.

(3) Persons aboard a conveyance the arrival of which has not been reported in accordance with the laws referred to in paragraph (a)(2), shall immediately notify a Customs officer and report their arrival, together with appropriate information concerning the conveyance on or in which they arrived at a location or locations specified by the appropriate district director and shall present themselves and their property for Customs inspection and examination.

(b) *Vehicles.* Vehicles may arrive in the U.S. only at a designated port of entry (see § 101.3 of this chapter) or Customs station if the

district director of the district in which the station is located authorized entry at that station (see § 101.4 of this chapter). The person in charge of any such vehicle shall, immediately upon arrival of the vehicle in the U.S., report the arrival to Customs. No vehicle shall, after arriving in the U.S., depart or discharge any passenger or merchandise (including baggage) without authorization by the appropriate Customs officer.

* * * * * * *

(d) Report of arrival under paragraphs (a), (b), and (c) of this section shall be made in person unless the appropriate district director, by local instructions, requires that it be made by some other specific means. Such local instructions issued by the district director will be made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation in the Customs district that supervises the location, and other appropriate means.

3. It is proposed to amend section 123.2 by revising paragraphs (a) and (c) to read as follows:

§ 123.2 Penalty for failure to report arrival or for proceeding without a permit.

(a) *Persons.* Any person arriving otherwise than by conveyance who enters the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station, who fails to report arrival as required in § 123.1(a) of this Part, or who departs from the port of entry or Customs station without authorization by the appropriate Customs officer, whether or not intentionally, shall be subject to a penalty as prescribed in § 123.1 of this Part.

(b) * * *

(c) *Vehicles.* (1) *Civil penalties.* The person in charge of any vehicle who —

(i) Enters the vehicle into the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station;

(ii) Fails to report arrival and present the vehicle and all persons and merchandise (including baggage) on board for inspection as required in § 123.1(b) of this Part;

(iii) Fails to file a manifest or any other document required to be filed in connection with arrival in the U.S. under this Part; or

(iv) Without authorization by the appropriate Customs officer, removes such vehicle from the port of entry or Customs station or discharges any passenger or merchandise (including baggage) shall be subject to civil penalties of $5,000 for the first offense, and $10,000 for subsequent offenses, as prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436). Any conveyance used in connection with any such violation shall be subject to seizure and forfei-

ture. He also may be subject to an additional civil penalty equal to the value of the merchandise on the conveyance which was not entered or reported as required by § 123.1(b) of this Part, and that merchandise may be subject to seizure and forfeiture unless properly entered by the importer or consignee.

(2) *Criminal penalties.* Upon conviction, any person in charge of a vehicle who intentionally commits any of the violations described in paragraph (1) of this section shall, in addition to the penalties described therein, be subject to criminal penalties of a fine of not more than $2000, or imprisonment for not more than 1 year, or both, as prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436). If the vehicle has or is discovered to have had on board any merchandise (other than the equivalent, for a vessel, of sea stores) the importation of which into the U.S. is prohibited, the person in charge of the vehicle is subject to an additional fine of not more than $10,000 or imprisonment for not more than 5 years, or both, as prescribed in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436). If the merchandise consists of any controlled substances, additional penalties may be assessed, as prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

4. It is proposed to revise section 123.9(a) to read as follows:

§ 123.9 Explanation of a discrepancy in a manifest.

(a) *Provisions applicable—*

(1) *Overages.* If any merchandise (including sea stores or its equivalent) is found on board a vessel or vehicle arriving in the U.S. that is not listed on a manifest filed in accordance with § 123.5 of this Part, or after having been unladen from such vessel or vehicle, is found not to have been included or described in the manifest or does not agree therewith (an overage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to a penalty as prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584). Any such merchandise belonging or consigned to the master, person in charge, or owner of the vehicle is subject to seizure and forfeiture.

(2) *Shortages.* If merchandise is manifested but not found on board a vessel or vehicle arriving in the U.S. (a shortage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to a penalty as prescribed in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

(3) *Failure to file a manifest.* The master or person in charge of a vessel or vehicle arriving in the U.S. or the U.S. Virgin Islands who fails to present a manifest to Customs is liable for a civil penalty of $5,000 for the first violation and $10,000 for each subsequent violation, and the conveyance used in connection with the failure to file is subject to seizure and forfeiture. A criminal conviction for intentional failure to file shall make the master or person in charge lia-

ble for a fine of not more than $2,000 or imprisonment for 1 year, or both, except that the criminal penalty may be increased to a fine of not more that $10,000 and/or imprisonment for not more than 5 years if any merchandise is found or determined to have been on board (other than sea stores or the equivalent for vehicles), the importation of which is prohibited.

* * * * * * *

5. It is proposed to further amend section 123.9 by removing the words "19 U.S.C. 1460 or" in paragraph (d)(3), (e) and (f).

6. It is proposed to revise section 123.9(d) to read as follows:

§ 123.9 Explanation of a discrepancy in a manifest.

* * * * * * *

(d) Action on the discrepancy report.

(2) If the criteria in paragraph (d)(1) are not met, applicable penalties under 19 U.S.C. 1584 shall be assessed.

* * * * * * *

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The general authority for Part 148 would read as follows:

Authority: 19 U.S.C. 66, 1498, 1624, 1629. The provisions of this part, except for Subpart C, are also issued under 19 U.S.C. 1202 (Gen. Headnote 11);

William von Raab,
Commissioner of Customs.

Approved: September 30, 1988.
Salvatore R. Martoche,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 3, 1988 (53 FR 44459)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88-127)

SMITH CORONA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BROTHER INTERNATIONAL CORP., NAKAJIMA ALL CO., LTD., CANON INC., CANON U.S.A., INC., SILVER SEIKO, LTD., SILVER REED AMERICA, INC., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., KYUSHU MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND PANASONIC CO. AND PANASONIC INDUSTRIAL CO., DIVISIONS OF MATSUSHITA ELECTRIC CORP. OF AMERICA, INTERVENOR-DEFENDANTS

Consolidated Court No. 87-02-00157

OPINION & ORDER

[Results of remand to International Trade Administration affirmed in part and reversed in part.]

(Decided September 20, 1988)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.*, and *John M. Breen*); *Robert E. Walton, Esq.*, Smith Corona Corporation, of counsel, for the plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); and Office of the Chief Counsel for International Trade, U.S. Department of Commerce (*Jean Heilman Grier*) for the defendant.

Tanaka Ritger & Middleton (*H. William Tanaka* and *Patrick F. O'Leary*) for intervenor-defendants Brother Industries, Ltd. and Brother International Corp.

McDermott, Will & Emery (*R. Sarah Compton, Kurt J. Olson* and *John H. Walsh*) and *Patton, Boggs & Blow* (*Frank R. Samolis* and *Michael D. Esch*) for intervenor-defendant Nakajima All Co., Ltd.

Covington & Burling (*Harvey M. Applebaum, David R. Grace* and *Jonathan A. Olsoff*) and *Delson & Gordon* (*Norman Moloshok* and *Jeffrey M. Samberg*) for intervenor-defendants Canon Inc. and Canon U.S.A., Inc.

Willkie Farr & Gallagher (*Christopher Dunn* and *Zygmunt Jablonski*) for intervenor-defendants Silver Seiko, Ltd. and Silver Reed America, Inc.

Weil, Gotshal & Manges (*A. Paul Victor, Stuart M. Rosen* and *Charles H. Bayar*) for intervenor-defendants Matsushita Electric Industrial Co., Ltd., Kyushu Matsushita Electric Industrial Co., Ltd. and Panasonic Company and Panasonic Industrial Company, Divisions of Matsushita Electric Corporation of America.

AQUILINO, *Judge:* The International Trade Administration, U.S. Department of Commerce ("ITA") has issued the *Final Results of Revised Scope Determination for Antidumping Duty Order on Portable Electric Typewriters from Japan Pursuant to Court Remand.*[1] The remand was pursuant to an order in conjunction with this court's slip op. 87-145, 11 CIT ——, 678 F.Supp. 285 (1987), and has resulted in a determination that portable electric typewriters containing calculators fall within the ambit of the antidumping-duty order, 45 Fed.Reg. 30,618 (May 9, 1980), while portable electric typewriters capable of text memory do not.

The plaintiff has interposed a motion for judgment on the agency record, as supplemented during remand, requesting, among other things, that the court

> (1) hold that the ITA's final remand redetermination with respect to portable electric typewriters incorporating text memory is unsupported by substantial evidence, (2) hold that the ITA's final remand redetermination with respect to portable electric typewriters incorporating a calculator function is supported by substantial evidence and in accordance with law, (3) reverse the redetermination with respect to text-memory portable typewriters, (4) remand the action to the agency for publication of a revised determination * * *.[2]

The intervenor-defendants oppose plaintiff's motion, and all but Nakajima All Co., Ltd. ("Nakajima") (and the defendant) seek reversal of the ITA's redetermination regarding typewriters with calculators. Intervenor-defendants Brother Industries, Ltd. and Brother International Corp. ("Brother") assert in addition that the ITA's analysis of the scope issue by means of the criteria set forth in *Diversified Products Corporation* v. *United States,* 6 CIT 155, 572 F.Supp. 883 (1983), is not in accordance with law, although the result is correct with regard to the typewriters with text memories. Similarly, intervenor-defendants Matsushita Electric Industrial Co., Ltd., Kyushu Matsushita Electric Industrial Co., and Panasonic Company and Panasonic Industrial Company, Divisions of Matsushita Electrical Corporation of America ("Panasonic") urge the court to find that the typewriters at issue had been expressly excluded from the original order.[3] Intervenor-defendants Canon Inc. and Canon U.S.A., Inc. ("Canon") stress the same point and also contend that "[t]here is * * * no record evidence supporting the assertion that portable automatic typewriters did not exist at the time of the original investigation,"[4] and that TSUS item 676.0510 referenced in the 1980 order should control the scope.

---

[1] Dated March 18, 1988 and referred to hereinafter as "Remand Results".

[2] Motion of Smith Corona Corporation for Judgment on the Agency Record as Supplemented During Remand, pp. 2–3.

[3] *See* Matsushita Memorandum of Law in Opposition to Plaintiff's Motion for Judgment on the Agency Record as Supplemented During Remand [hereinafter cited as "Panasonic Memorandum"], pp. 10–13. *See also* Memorandum of Nakajima All Co. Ltd. in Opposition to Smith Corona Corporation's Motion for Judgment on the Agency Record as Supplemented During Remand [hereinafter cited as "Nakajima Memorandum"], p. 3, n. 2.

[4] Brief of Defendant-Intervenors Canon Inc. and Canon U.S.A., Inc. in Opposition to Smith Corona's Motion for Judgment on the Agency Record as Supplemented During Remand [hereinafter cited as "Canon Brief"], p. 27.

The parties have fully briefed and argued their respective positions.

I

As discussed in slip op. 87–145, the original antidumping-duty order covered typewriters which were portable and electric. By the time of the first administrative review thereof, technology had brought forth typewriters which are portable and "electronic". This advancement led the ITA, in conjunction with publication in 1983 of the preliminary results of that first administrative review, to invite interested parties to comment on whether these portable electronic typewriters are within the scope of the 1980 order. Thereafter, the agency concluded that they are—in reasoning reported *sub nom. Portable Electric Typewriters From Japan; Final Results of Administrative Review of Antidumping Duty Order,* 48 Fed.Reg. 7,768, 7,769–70 (Feb. 24, 1983), and repeated at length in slip op. 87–145. The agency's reasoning was based on (1) general physical characteristics, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the merchandise and (4) the channels of trade in which the merchandise moves, the same approach approved by the court in *Diversified Products Corporation* v. *United States, supra,* for determining whether merchandise developed after issuance of an antidumping-duty order is nevertheless within the order's scope.[5]

In any event, the ITA concluded that its order covers portable electric and electronic typewriters, which are referred to from time to time hereinafter as "PETs". Technology has not stood still since then, however, with some machines equipped with calculators and more recently text memories, the latter of which give rise to characterizations of "automatic". In slip op. 87–145, the court found the record "clear that the typewriters at issue * * * were not in existence at the times of either the filing of [the] original petition or the issuance of the May 1980 order"[6] and that the order did not expressly exclude them from its coverage. *See* 11 CIT at ——, 678 F.Supp. at 289–90. *See also Royal Business Machines, Inc.* v. *United States,* 1 CIT 80, 507 F.Supp. 1007 (1980), *aff'd,* 669 F.2d 692 (CCPA 1982); *Diversified Products Corporation* v. *United States,* 6 CIT at 160, 572 F.Supp. at 888. This finding was made in the face of intervenor-defendants' contentions to the contrary.

The ITA's scope determination originally challenged in this case was that the PETs with calculators or text memories were excluded from the 1980 order. However, in response to plaintiff's motion to reverse that determination, the defendant took the following position:

> After reviewing the administrative record in this case along with arguments advanced by plaintiff in support of its motion

[5] *Compare* 48 Fed.Reg. at 7,769 *with* 6 CIT at 162, 572 F. Supp. at 889, which court opinion also refers to cost as a fifth factor. *See Kyowa Gas Chemical Industry Co.* v. *United States,* 7 CIT 311, 312 (1984).

[6] 11 CIT at ——, 678 F.Supp. at 289.

for judgment upon the agency record, the ITA concedes that its determination that PETs incorporating calculators or text memory were specifically excluded from the original investigation and order is not supported by substantial evidence in the administrative record. Furthermore, Commerce concedes that its prior conclusion to the effect that under the criteria established in *Diversified Products,* * * * PETs incorporating calculators or text memory should be excluded from the scope of the outstanding antidumping duty order on portable electric typewriters from Japan is not supported by substantial evidence. Therefore, the Department requests that that part of this consolidated case which deals with the scope issue (the entire Court No. 84-1-00046 and Count 8 of the complaint in Court No. 87-02-00157) be remanded so that it can reconsider its scope determination and publish a revised scope determination which would be supported by substantial evidence in the administrative record.[7]

In contrast to this position, the intervenor-defendants urged the court to search the record for substantial evidence. The court did so, but found the facts tending to support their position insubstantial and therefore granted the remand.

Now that the record has been supplemented, the intervenor-defendants do not show that it contains evidence that the PETs presently at issue had been excluded from the 1980 antidumping-duty order. Rather, they repeat arguments already considered unpersuasive in slip op. 87-145.

II

Under 19 U.S.C. § 1516a(b)(1)(B), the standard of review to which the court must adhere in considering the remand results is whether they are supported by substantial evidence on the record and are otherwise in accordance with law. *See, e.g., Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT ——, 636 F.Supp. 961, 965 (1986), *aff'd,* 810 F.2d 1137 (Fed.Cir. 1987). As pointed out, for example, in *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 523, 622 F.Supp. 1071, 1074-75 (1985), the "substantial evidence standard 'frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute' ", quoting *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620 (1966). Nevertheless, findings must be based on " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 477 (1951), quoting from *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938).

[7] Defendant's Response to Plaintiff's Motion for Judgment on the Agency Record, p. 5.

Such evidence exists in the record, as supplemented upon remand, with regard to the ITA's determination that PETs with calculators are within the scope of the 1980 anitdumping-duty order. Just as the original record was found inadequate to sustain their exclusion from the order, the ITA has reached the same conclusion in its redetermination. In finding PETs incorporating calculators covered by the order, the agency relied on the *Diversified Products* criteria.

As for the first of those criteria, the general physical characteristics of the PETs with and without calculating mechanisms are virtually identical. For example, as pointed out by the ITA:

> * * * This is apparent when comparing Canon's model S-15 prior to and following the addition of the calculating function. We compared Canon Inc.'s model S-15 shown in the Wholesale Price Schedule * * * dated February 16, 1988 * * * to the model S-15 depicted in Canon's Wholesale Price Schedule for July 1, 1986, Appendix 5. These products are exactly the same except for the calculating mechanism. Remand Results, p. 7.

The respondents argued below that there are significant physical differences. Brother, for one, described the internal distinctions of its EP-5 from standard PETs as follows:

> * * * A standard electronic PET, incorporating a central processing unit ("CPU"), a read only memory ("ROM"), and a random access memory ("RAM"), is essentially a process control computer. It lacks a user memory found in more sophisticated machines, including the [PETs with calculators] and [PETs with text memories] * * *.
> * * * The EP-5's mathematical computing capability results from the software embedded onto the ROM chip. The EP-5's ROM circuitry design creates a discrete logic pattern, which is distinctive from that of a standard PET's ROM. Software is also embedded on the electronic PET ROM. However, the electronic PET ROM and the EP-5 ROM are not interchangeable or substitutable. To obtain the calculating capabilities associated with a [PET with a calculating mechanism], only a ROM with calculating software designed into [it] can be used.
>
> The distinctiveness of the ROMs cannot be understated. The physical differences therein give a standard electronic PET and EP-5 their unique capabilities.[8]

This may be true, but the court is not persuaded that what amounts to the implantation of a single ROM chip in an otherwise identical machine results in a significant, general physical distinction. Diagrams demonstrate that this implant is not substantial. Moreover, to repeat, PETs with and without a calculating mechanism generally exhibit the same external characteristics. *See, e.g.*, S.R.Doc. 12, Attachments 2 and 5.

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[8]Supplemental Record Document ("S.R.Doc.") 13, pp. 10-12 (citations and footnotes omitted).

As for consumer expectations, the ITA reviewed the record, as supplemented, and noted the absence of a "price premium" for a calculator in finding that the expectation of the consumer is not influenced by that additional feature. *See* Remand Results, p. 8; S.R.Doc. 27, Exhibit 6. If the embedded calculators and the complexities of their chip designs and internal circuitry distinguish the PETs at issue from those originally under the order, the evidence regarding prices at which those machines have been available does not indicate that any such distinction is substantial. For example, in its Remand Results, the ITA noted at (pages 8–9) that

> Canon significantly decreased its price for the S-15 after adding the calculating feature to the model. In Canon's Comments, Appendix 2, the model S-15 lists for a suggested retail price of $329.95 * * * for February 1, 1986. At this time the S-15 did not have a calculating function * * *.
>
> Subsequent to this, * * * the Wholesale Price Schedule for July 1, 1986 lists a suggested retail price of $299.95 for the S-15 which now incorporates a calculating function but is in all other aspects identical to the earlier model S-15. This is a substantial reduction in selling price over this short time period and is not consistent with price movements of other models listed in Canon's two price schedules.

The record further reflects that PETs with and without calculators have nearly identical uses. The calculator "only allows the operator to perform simple calculations that can be done in one horizontal line and does not allow for columnar calculations." Remand Results, p. 7. Based on this limited capability, it is clear that the primary use of such a PET cannot be as a calculator, rather still as a typewriter. *Cf.* S.R.Doc. 13, Exhibit 11. Indeed, as to the final criterion, none of the parties dispute, and the record reflects, that the channels of trade for PETs with and without calculators are identical.

In sum, the ITA's determination after remand that the addition of a calculating mechanism to a portable electronic typewriter does not exclude that product from the same class or kind of merchandise subject to the investigations is supported by substantial evidence in the record and is otherwise in accordance with law.

III

The same cannot be said, however, for the ITA's determination as to the automatic PETs. That is, a careful examination of the record, as supplemented, covering those typewriters fails to reveal substantial evidence in support of their exclusion from the realm of portable electric typewriters. The information now in the record which the ITA apparently views as "substantial" consists primarily of magazine articles, brochures of various models of typewriters, advertisements from discount stores, packing materials, and users'

guides, which do not provide much underpinning for the determination reached after the agency's analysis of the *Diversified Products* criteria. Furthermore, the other information in the record—affidavits attempting to conjure up consumer motives, quotations of costs and prices in no particular contexts, the transcript of another case on classification of an automatic typewriter—does not add facts substantial enough to sustain that determination on the record.

Of course, this does not mean that there are no differences between the PETs with text memories and the portable typewriters in existence when the administrative proceedings first began. The Remand Results reason as follows with regard to automatic typewriters then and now:

> Like electronic typewriters, which were initially considered "office" typewriters, automatic typewriters were marketed to the business and government sectors where heavier use is required and repetitive tasks performed, whereas the electromechanical typewriters subject to the original investigation were lighter in weight and marketed for home and student use. Technological advances over the years have brought automatic typewriters down to a portable level and they are now also marketed as consumer products.
>
> The Department has determined that automatic typewriters were not subject to the investigations because they were not portable. Therefore, we have considered the criteria set forth in *Diversified Products* in determining whether automatic typewriters which now are portable are of the "class or kind" of merchandise subject to the order. We have concluded that, based on the criteria set forth in *Diversified Products,* automatic typewriters are not of the same class or kind as typewriters subject to the original investigations. Remand Results, p. 4.

That conclusion is not premised, however, on evidence that a reasonable mind might accept as adequate to show that the addition of text memories makes the typewriters something other than PETs.

A

As to general physical characteristics, automatic portable typewriters were determined by the ITA to be only "slightly different" than electronic PETs without text memories in outward appearance. *Id.* However, according to the ITA,

> [m]ore importantly, the internal circuitry of an automatic typewriter is substantially different from that of the electromechanical units originally investigated and electronic typewriters determined to be within the scope of the order in 1983. Remand Results, p. 4.

While plaintiff's papers point to the similarity in the component make-up—specifically, random access memory, read only memory, and a central processing unit—of both automatic and non-automatic PETs,[9] the defendant claims that the "key distinction" is the sophistication of those components, which " 'allow for the same memory capabilities as found in word processors and computers' ".[10] The defendant and the intervenor-defendants essentially argue that, unlike the single function—typing—performed by electro-mechanical and electronic portable typewriters, those with text memories have "word-processing" capabilities (*e.g.*, encoding, storing, reading, and printing information) which require "vastly more complex" software that is "manifested in the microelectronic circuitry embedded on the chips".[11] Further:

> * * * Once the software has been embedded onto the ROM, the electronic PET ROM and the [automatic PET] ROM are neither interchangeable or substitutable without changing the machine's performance capabilities. S.R.Doc. 13, p. 15.

The respondents below had made similar arguments with regard to PETs with calculating mechanisms. However, the record is not convincing that a chip implanted to provide text memory amounts to a substantial difference from one embedded to provide calculating capability. And, as pointed out in Point II above, the ITA did not consider such an enhancement of consequence for the calculator PETs.

While the supplemented record supports that result, it does not support a contrary conclusion as to PETs with text memories.

As for "functional differences"[12] between automatic and non-automatic typewriters, the defendant cites a comparison by Brother of the features of its "more sophisticated"[13] model with text memory, the CE-380, with an out-of-production electro-mechanical model, the XL-20+3, which was investigated at the time of the original order. *See* Defendant's Memorandum, pp. 19–20. Described as "technologically * * * eons ahead" of the older machine,[14] the CE-380 contains an "optional 16k memory card and thesaurus", 160-character liquid crystal display, spelling correction, and correction mechanism by electronic lift-off. *See* S.R.Doc. 13, Exhibit 7. By comparison, the most advanced features of an XL-20+3 were a built-in correcting ribbon and a "power electric carriage return". *See id.*, Exhibit 3.

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[9] *See* Plaintiff's Memorandum of Points and Authorities In Support of Motion of Smith Corona Corporation for Judgment on the Agency Record as Supplemented During Remand [hereinafter cited as "Plaintiff's Memorandum"], pp. 19–21.

[10] Defendant's Memorandum in Partial Opposition to Motion of Plaintiff, Smith Corona Corporation, for Judgment on the Agency Record as Supplemented During Remand [hereinafter cited as "Defendant's Memorandum"], p. 18, quoting from the Remand Results, p. 4.

[11] Brother Memorandum, p. 35. *See, e.g.*, Panasonic Memorandum, pp. 7–8. Several parties submitted diagrams of the internal circuitry of text-memory and non-text-memory typewriters. *See* Record Document ("R.Doc.") 245, Exhibit 9; S.R.Doc. 14, Exhibit 2; S.R.Doc. 27, Exhibit 1.

[12] Canon Brief, p. 13.

[13] S.R.Doc. 13, p. 30, n. 26.

[14] *Id.* at p. 14.

While such components constitute physical differences, they do not add up to a different class or kind of merchandise. Any comparison of features of a manufacturer's older or obsolete machines with those of its most advanced should show differences, but such a phenomenon is not necessarily conclusive of substantially distinct general physical characteristics. Indeed, even when comparing the XL-20+3 with another out-of-production, electronic model, the Brother EP-20, the features are also "functionally" different. The EP-20 has been described as

> personal electronic printer [that] is a lightweight, portable, battery-powered unit with a calculating mechanism * * *. A calculating function handles the four basic functions, and a second shift function will print extra characters from international languages.
>
> * * * A 16 digit display allows the user to make corrections before actual printing * * *. R.Doc. 7.

The correction mechanism contained in this machine is one of many distinct elements which comprise its physical characteristics and distinguish it from the electro-mechanical model. Yet, the ITA has now determined that the EP-20 falls within the scope of the order covering ther XL-20+3. *Cf.* Remand Results, pp. 6–7. Thus, notwithstanding the technological advances evidenced both internally and externally by the EP-20,[15] understandably, it remains within the same class or kind of merchandise as the XL-20+3.

Other portable electronic typewriters, those without calculating mechanisms, were similarly characterized as "fundamentally distinct[ ]" from electro-mechanical PETs during the 1983 scope proceeding, to wit:

> * * * [T]he respondents state that electronic typewriters are the product of a different technology, that they are radically different in physical characteristics, that the additional features such as memory capability cannot be duplicated b [*sic*] a portable electric machine * * *. 48 Fed.Reg. at 7,769.

Nevertheless, the physical differences did not lead the ITA to determine that the electronic typewriters were not of the same class or kind of merchandise subject to the 1980 order.[16]

Likewise, the record evidence noted by the ITA and elaborated upon by the intervenor-defendants on the internal circuitry of an automatic typewriter does not support a finding that it, unlike its non-automatic electronic and electro-mechanical counterparts, is not also subject to the order. Word-processing capability notwith-

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[15] *Compare* S.R.Doc. 14, Exhibit 3 (brochure for XL-20+3 with photograph) *with* Memorandum in Support of Smith Corona's Motion for Judgment on the Agency Record, Appendix 4 (advertisement for EP-20).

[16] In its memorandum at page 19, the defendant implies that the plaintiff misplaces its reliance on the 1983 determination (by the ITA) that electronic machines are within the scope of the order covering electro-mechanical ones despite their physical differences. Claiming that that determination was not based on an analysis of the *Diversified Products* criteria, the defendant impliedly distinguishes it from the scope determination now under review on the ground that consideration of such criteria herein is "necessary".

As in the instant scope ruling, however, the 1983 determination clearly states that the ITA considered the physical characteristics of the electronic PETs. *See* 48 Fed.Reg. at 7,769. The necessity of that analysis was never addressed, and there is no indication that that issue affected the outcome.

standing, the physical differences between typewriters with text memories and those without do not detract from their fundamental purpose. According to the defendant, the "printing of letters on paper in the manner of a printing press" is the typewriter's "primary function",[17] not its editing capabilities or its ability to print characters automatically without manual operation of the keyboard, as the intervenor-defendants claim. *See, e.g.,* S.R.Doc. 13, pp. 40–41; S.R.Doc. 21, pp. 17–19.

Of course, the prominence of one component compared with another can be a determinative factor as to whether the physical characteristics of a product are distinct from those of the original merchandise. *Compare, e.g., Color Television Receivers, Except for Video Monitors, from Taiwan,* 51 Fed.Reg. 46,895, 46,902 (Dec. 29, 1986), *with Television Receivers, Monochrome and Color, from Japan,* 52 Fed.Reg. 8,940, 8,946 (March 20, 1987). Those scope determinations indicate, however, the PETs with text memories, whose primary function is admittedly the same as that of PETs without memories, do not differ physically to such an extent as to fall within another class or kind of merchandise.

The defendant nevertheless argues (at page 21 of its memorandum) that the similarity of the primary function

> is not sufficient to establish that automatic typewriters are within the scope of the * * * order. The reason is that the antidumping order specifically excluded certain typewriters—the automatic typewriters then in existence—that had the very same primary function.

But this argument skirts the fact recited in the remand results and quoted above, page 12, that it was the non-portability of those earlier automatic machines, which were "office" typewriters, that meant their exclusion from the order.

Portability, an electrically-activated keyboard, and an ability to imprint characters like those of a letterpress are common characteristics of PETs. *See, e.g.,* S.R.Doc. 28 at A–2 to A–3. When those characteristics are combined with "pure typewriter mode operation"[18] in a unit designed for easy manipulation of a variety of paper types,[19] they amount to PETs of the class or kind subject to the original order.

Some intervenor-defendants claim that this approach is too general and would encompass "word processors, lap top computers, most calculators". *E.g.,* Brother Memorandum, p. 57. Those products, however, have other characteristics which distinguish them from PETs. Most obviously, what has become known as a "word processor" displays at least one-half page of text on an electronic screen. *See, e.g.,* S.R. Doc. 13, p. 36. An automatic PET, on the other hand, displays at best some two lines of text. Moreover, such a PET fea-

[17] Defendant's Memorandum, p. 21.

[18] S.R.Doc. 10, Exhibit 7(6) at 74.

[19] *See id.,* Exhibit 11(5) at 60.

tures neither the printing speed nor the storage capacity of a word processor.[20] Simply increasing the complexity of the machine's microelectronic circuitry does not transform a typewriter into a word processor, and certainly not into a computer. And the more sophisticated semiconductor chip likewise does not create a distinct class or kind in between a portable electronic typewriter and a word processor, as has been suggested. *See, e.g.*, Canon Brief, p. 16. The general physical characteristics remain substantially the same, and a PET with text memory clearly retains its typewriter identity.

B

The ITA takes the position that the ultimate use of an automatic PET, in considering a second *Diversified Products* criterion, is substantially different from that of a non-automatic PET:

> * * * [A] primary distinguishing characteristic of an automatic typewriter is its capability to print automatically without the direct operation of a keyboard. This function also makes the automatic typewriter more similar to a word processor.[21]

The defendant also argues that the "review and revision function" is a distinguishing use of automatics, as is the ability to "remove the page being typed, review the text, and make corrections a day, a week or even a month later". Defendant's Memorandum, p. 23. The plaintiff, on the other hand, argues that the review and revision capabilities are so limited as to preclude the use of automatic PETs as substitutes for word processors. *See* Plaintiff's Memorandum, pp. 39–43.

The record supports plaintiff's position. The evidence indicates that the "word processing" capabilities of the automatics are not at high enough "levels of sophistication"[22] to support a finding that machines with text memories are in the same class or kind of merchandise as word processors or personal computers. Only those automatic PETs with larger information storage capacities come anywhere near to performing effectively those features described above as "distinguishing".[23] The papers submitted make references to PETs with memory storage capacities of 16k, yet the record indicates that the typical model with memory has a lesser capacity, the equivalent of only two or three pages of text.[24] Thus, a memory permits review and revision of text, but only to the extent that

> it fits within the few pages the memory allows. The small display screens make seeing what you're doing a bit hard, as do the often-cumbersome means provided for moving back and

[20] *See, e.g.*, S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; Supplemental Record Confidential Document ("S.ConfDoc.") 5, Exhibit 7.

[21] Remand Results, p. 5. *See also* Nakajima Memorandum, p. 24, citing S.R.Doc. 10, pp. 19–20, Exhibit 2, paras. 14, 18, 25, 26 and Exhibits 4, 7 and 13.

[22] S.R.Doc. 10, Exhibit 2 at 12.

[23] *See e.g.*, S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; and S.ConfDoc. 5, Exhibit 7, at 687.

[24] *See generally id.* at 687, 689 and 690.

> forth through the text. You'd probably end up printing a draft version, then entering the corrections.[25]

Without an additional, external memory device, the automatic PETs are "insufficient" for preparing "lengthy, multipage documents or requir[ing] extensive memory to store formats and repetitive forms". S.R.Doc. 10, Exhibit 4(3). Thus:

> * * * We recommend electronic typewriters to customers who do not need a lot of storage. It makes sense to save the computer for long documents and keep an electronic typewriter for quick notes and letters.[26]

Other "major differences" distinguishing word processors from typewriters, as revealed in the record, include "the size of the system, the special functions, the speed of operation of the microprocessors, the quality of the text display, * * * and the cost". *Id.,* Exhibit 2, p. 12, para. 30. What the court gleans from this is that, as a result of these distinctions, a consumer interested primarily in text storage and editing capabilities purchases a dedicated word processor or a personal computer with a word processing program. *See e.g., id.,* Exhibit 7(9). Specific uses exclusive to those machines, in contrast to typewriters, are described in the supplemented record. For example, in one magazine article a salesperson is advised to recommend the purchase of a dedicated word processor for users producing long documents with complex formats and revisions. For someone tying "into a network, updat[ing] a spread sheet or data base file, and do[ing] word processing tasks, * * * sell a microcomputer with word processing and applications software". *Id.,* Exhibit 11(5).

The record further indicates that, in order to achieve significant word-processing ability with an electronic typewriter, a system of various, additional components—such as a video screen and an external memory device—is required.[27] While there are references to the PETs at issue as "word processing typewriters" in the papers submitted[28] and in the record, the trade apparently uses that terminology to describe such a system of components added on to a "common typewriter with memory". *Id.,* Exhibit 7(9). Stated another way, it is "modularity and upgradability" which place typewriters within the range of capabilities of word processors or personal computers. *See id.,* Exhibit 7(7). But without such enhancements, the underlying machine, which is all that is at issue herein, remains just an "ordinary typewriter". *Id.*

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[25] *Id.* at 687. *See also* S.R.Doc. 10, Exhibit 7(4) ("the one- or two-line display alone is a major limitation when compared with a video screen") and Exhibit 7(7) ("A one line or two line display screen is not going to serve you with anything near the value of the unit").

[26] S.R.Doc. 10, Exhibit 11(6) (Computer Merchandising, *Electronic Typewriters: Where Do they Fit?,* p. 45 (July 1–14, 1985)).

[27] *See, e.g.,* S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; S.ConfDoc. 5, Exhibit 7.

[28] *See e.g.,* Nakajima Memorandum, p. 17.

The uses to which automatic PETs are put are the same as those for "ordinary" PETs.[29] According to papers submitted by Nakajima, the general uses include preparing letters, preparing texts and reports, filling out forms, preparing statistical tables, and preparing lists.[30] That text memory may facilitate the performance of some of those tasks does not establish that automatic typewriters are therefore interchangeable with word processors or personal computers,[31] as the defendant has concluded. *See* Remand Results, p. 5. Rather, the record reflects that PETs are purchased for their "typewriter functions", for which other products either cannot be used—or cannot be used as efficiently. *See* S.R.Doc. 10, Exhibits 7(11) and 11(6). Such functions include "writing short notes, addressing several envelopes or typing a few Rolodex cards, to name a few"[32] for there is

> still the difficulty of using the computer for a lot of the day to day typing functions * * * [s]imple functions, like typing forms or memos, envelopes. S.R.Doc. 21, Exhibit 22 at 20.

Word processors or personal computers, unlike typewriters, "are not efficient when you have to frequently switch from task to task". S.R.Doc. 10, Exhibit 11(6) at 46. Thus, they hardly qualify as replacements for electronic typewriters even though arguably more sophisticated. *See id.,* Exhibit 7(8). Stated another way, in order to accomplish the widest range of tasks, there is a place for both a word processor and a typewriter. *See id.,* Exhibit 11(9) at 58.

Although certain tasks are carried out more efficiently on typewriters with text memories than without, it is not that function which makes the machine, as described by a marketing expert, an "indispensible tool". *See* S.R.Doc. 10, Exhibit 7(4) at 70. As a stand-alone product, its word-processing capabilities are simply too limited. Whether automatic or not, typewriters perform "flexible functions that are very difficult for a computer to do". S.R.Doc. 21, Exhibit 22. In short, the record as a whole does not support the ITA's finding that the "ultimate use of automatic [PETs] is substantially different from that of typewriters originally investigated", to quote from the Remand Results, page 5.

C

Similarly, the record does not support a finding that consumers' ultimate expectations of automatic PETs—a third consideration under *Diversified Products*—are significantly different from those of PETs without text memories. As evidence to support the ITA's

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[29] This does not hold true for all automatic typewriters, however. As the record reflects, those in existence at the time of the original antidumping investigation were heavy, expensive office machines in which the automatic features were devoted to the performance of repetitive tasks and the composition of large documents. *See* S.R.Doc. 27, Exhibits 10–12; Plaintiff's Memorandum, Appendix 6. Such uses are in contrast to those of portable automatics.

Similar analysis was relied on in the ITA's determination that PETs with calculators are within the scope of the 1980 order. *See* Remand Results, p. 7.

[30] *See* S.R.Doc. 10, Exhibit 2 at 16, para. 40. *Compare* S.R.Doc. 21, Exhibit 22 at 19 ("the average person probably doesn't have much of a need for databases or spreadsheets").

[31] *See, e.g.,* S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; S.ConfDoc. 5, Exhibit 7, at 685.

[32] S.R.Doc. 10, Exhibit 11(6).

view that "the consumer's motive for purchasing an automatic typewriter is different from his motive for purchasing a non-automatic typewriter",[33] the defendant points to PET advertisements submitted by the parties,[34] which it claims give "prominence" to the "word processing capabilities of typewriters". *See* Defendant's Memorandum, p. 26. What those promotional materials contain in general are pictures of the typewriters and lists of available features, some of which include references to "text memory" or "word processing". However, even if all of the advertisements focused exclusively on those references,[35] other parts of the record reflect that the underlying reason a consumer purchases an electronic typewriter with text memory is an expectation that it will be able to perform as a typewriter, albeit with some storage and editing capabilities. If a consumer were primarily interested in those capabilities, a typical automatic PET with a few pages' worth of memory and either no or very little display screen would hardly be satisfactory. While the consumer could enhance such a typewriter with a disk drive, keypad attachment, CRT monitor and word-processing software, the underlying machine would remain a PET. Indeed, the advertisements, sales displays, brochures, packaging and other manufacturers' materials in the record confirm that the merchandise at issue is sold as a *typewriter,* and not as another product.[36]

By way of comparison, as described in the record, the Smith Corona PWP system "is an admirable attempt at turning a typewriter into a word-processor".[37] It is claimed to be a "complete word-processing system" which includes an "electronic typewriter with spelling dictionary and correction memory." *See, e.g.,* S.R.Doc. 21, Exhibit 11(19). Such a claim anticipates that the consumer expects the capabilities of a typewriter, as well as of a word processor. However, if typewriter attributes were not of primary interest, there would be little reason to purchase that system, built as it is around an automatic typewriter, notwithstanding that such a system has some capabilities similar to those of a word processor. But dedicated word processors or personal computers are superior products for those consumers primarily interested in text editing and storage capabilities, with limited need for functions that only typewriters can fulfill.

Electronic typewriters with word-processing capabilities that arguably compare with those of dedicated word processors or personal computers are part of modular systems. The record indicates that the Smith Corona PWP is available for $599.00,[38] but, at that price,

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[33] Remand Results, p. 5.

[34] *See* S.R.Doc. 10, Exhibit 11; S.R.Doc. 14, Exhibit 4; S.R.Doc. 21, Exhibit 17.

[35] In general, the advertisements simply do not focus on text-memory, although they often point to it along with other attributes, on occasion in bold print.

[36] *Cf. Gold Star Co.* v. *United States,* 12 CIT ——, ——, Slip Op. 88-102 at 8 (July 29, 1988) ("The present merchandise is *sold* on the U.S. market not as a [printed circuit board] nor as a [color picture tube], but as a color television receiver; the object of the original antidumping duty order") [emphasis in original].

[37] S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; S.ConfDoc. 5, Exhibit 7, at 658.

[38] *See, e.g.,* S.R.Doc. 2, Exhibit 17.

"you could practically buy an IBM-PC clone, the nucleus of a far more powerful and versatile system".[39] Hence, the stronger inference is that the system's more sophisticated features do not induce its purchase. Rather, its capacity to perform typewriter functions is determinative. Otherwise, a consumer presumably would purchase that product which would provide the greater text storage and editing capabilities for the money.

The ITA noted in its Remand Results that automatic PETs "demand a higher retail price than those without text memory" and that the "ability to store text will add to the typewriter's cost". Remand Results, p. 5. As stated by intervenor-defendant Nakajima, since

> buyers are willint [*sic*] to pay more for the ability to input, store, recall and edit documents * * * it is clear that consumers' expectations as to automatic typewriters are different than their expectations of non-automatics. Nakajima Memorandum, p. 31.

While a selective consideration of cost indicates automatic PETs are priced higher than non-automatics,[40] the record also demonstrates that typewriters with other features, such as "spell check", also command higher prices than those without them. For example, two Brother models offer identical features, including 5k text memory, except that the AX-20 offers a spelling dictionary, while the AX-15 does not.[41] The former retails for $100.00 more than the latter.[42] Under the ITA's rationale, the "price premium" for the model with spell check would indicate that the consumer's motive for purchasing such a typewriter differs from that for purchasing one without the feature[43] rather than suggest that the purchaser is simply willing to pay the price for that added feature.

Other information in the record—affidavits of individuals in the typewriter industry,[44] including retailers and manufacturers,[45] market studies,[46] and customer surveys[47]—likewise does not provide support for a finding that consumers who purchase an automatic

[39] S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; and S.ConfDoc. 5, Exhibit 7, at 689.

[40] The defendant characterized as "hardly useful" plaintiff's comparison of the prices of two of its own non-automatic PETs with two automatic PETs manufactured by Brother. *See* Defendant's Memorandum, p. 27.

According to the plaintiff, the Brother machines retailed for less than the plaintiff's despite the presence of text memory. *See* Plaintiff's Memorandum, p. 35. Contrary to defendant's characterization, a comparison of prices of all models that are available to the consumer regardless of manufacturer would reflect more accurately consumer expectations. S.R.Doc. 10, Exhibit 5(1), for example, provides exactly such a comparison among typewriters produced by a broad range of manufacturers, and the Remand Results indicate (at page 5) that the ITA considered the comparison useful.

[41] *See* S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; and S.ConfDoc. 5, Exhibit 7, at 690–91.

[42] *See id.*

[43] The court notes in passing that that feature is equally as prominent as text memory in materials in the record.

[44] *See* S.R.Doc. 10, Exhibit 2; S.R.Doc. 12; S.R.Doc. 21, Exhibit 21. With regard to consumer expectations, the affidavits contain statements to the effect that purchasers of automatic PETs expect them to perform sophisticated tasks like word processers or personal computers. Other than their personal experiences in the industry, however, the affiants do not disclose grounds for their viewpoints.

[45] *See* S.ConfDoc. 5, Exhibit 4A, which contains standardized affidavits of owners, executives and other personnel of outlets of PETs. Exhibit 4B contains additional statements.

[46] *See* S.ConfDoc. 5, Exhibit 9B, which is a market study performed by the plaintiff in 1984 on the basis of a mail survey in which consumers were asked what typewriter feature they desired most.

[47] *See* S.ConfDoc. 5, Exhibits 9A and 9C.

PET expect a machine distinct from a non-automatic one. Rather, it indicates that consumers consider text memory an attractive feature among others on a typewriter that is portable:

> * * * [S]ome of the key features on electronic typewriters are features that have been around since the inception of the electronic typewriter. Variable pitch, a variety of typestyles, one line correction. If you look at the features that people are buying and getting excited about, it's those basic features.[48]

In its memorandum, intervenor-defendant Brother infers (at page 45) that the consumer is very aware of the available automatic features and "expects a unique and special product" when purchasing a PET with text memory. Its marketing director, on the other hand, indicated that consumers are not necessarily aware of what is available and are impressed by all of the features on today's PETs. *See* S.R.Doc. 21, Exhibit 22. Without evidence to support their assertions, several other intervenor-defendants state that consumers expect to use PETs with text memories for "multiple reproduction"[49] of documents and "mass mailings of individualized letters". Nakajima Memorandum, p. 31. As shown in the record, however, use of automatic PETs as printers is not efficient, "taking nearly two to four minutes to print a business letter that an ordinary dot-matrix printer whip[s] out in 32 seconds".[50] Because of this, as well as the fact that paper must be advanced manually, any expectation of a PET as an efficient office machine or as a machine which "contains the sophistication of a word processor"[51] would be hard to realize.

D

In considering the fourth *Diversified Products* criterion, the ITA determined that automatic and non-automatic PETs are sold through the same channels of trade, specifically, through discount stores, mass merchandisers, office suppliers and department stores.[52] This determination is not diminished by the fact that other products such as microwave ovens, telephones and word processors are similarly marketed. *See, e.g.,* S.R.Doc. 10, Exhibit 12.

Although the plaintiff argues that more weight should be given to this criterion, the cases cited for the proposition that the ITA's scope rulings purportedly turned on the channels of trade are not controlling; the agency has discretion in how it chooses to balance the various criteria. *See, e.g., Consumer Products Division, SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033 (Fed.Cir. 1983). In

[48] S.R.Doc. 21, Exhibit 22 at 15. Such a viewpoint refutes, of course, the position of intervenor-defendant Nakajima that text memory is a "primary function * * * widely recognized by consumers". Nakajima Brief, p. 28. That is, "there are still people out there who can't distinguish between electric and electronic" typewriters. S.R.Doc. 21, Exhibit 22 at 15.

[49] Panasonic Memorandum, p. 9.

[50] S.R.Doc. 10, Exhibit 5(1); S.R.Doc. 14, Appendix 4; S.R.Doc. 27, Exhibit 7; and S.ConfDoc. 5, Exhibit 7, at 687. *See also* S.R.Doc. 10, Exhibits 11(6) and 7(4), at 72.

[51] Nakajima Memorandum, p. 27.

[52] *See* Remand Results, p. 6; S.ConfDoc. 5, Exhibits 2 and 4; S.R.Doc. 21, Exhibit 17; S.R.Doc. 28 at 11 and A-7.

any event, the record shows, and the agency has determined, that most of the typewriters at issue, like those admittedly covered by the antidumping-duty order, are sold in different channels of trade than heavy office machines, which are marketed through specialized dealers. *See, e.g.,* Remand Results, p. 6. This—coupled with the fact that most PETs, automatic or non-automatic, are sold for home use[53]—indicates that the significant distinction is between office machines and PETs, not PETs with and without text memories. *Cf., e.g.,* R.Doc. 298, Appendix 25.

E

As indicated above, information was submitted to the ITA with regard to cost differences between automatic and non-automatic PETs, including (1) testimony that the cost of adding to a PET the hardware for 8k text memory is about $2.10 per unit;[54] (2) market price quotations indicating prices for memory chips ranging from 8k to "32K x 8 NMOS static RAM";[55] (3) an affidavit attesting to the minimal cost of adding the memory function;[56] (4) factory production costs for the Brother non-automatic CE-50 and the automatic CE-58;[57] (5) a table reflecting "ROM Software Development Man Hours and Costs" for the Brother EP-5 with a calculator, the automatic AX-28, and the non-automatic AX-22;[58] and (6) an affidavit stating, without reference to source, that adding text memory is "approximately 15% of the total unit cost", as is the addition of a liquid crystal display. *See* S.R.Doc. 10, Exhibit 2, para. 39.

Given the number of PETs at issue and their variations, however, the information submitted does not provide a firm basis for evaluating the figures presented. For example, the production-cost table submitted by Brother for its CE-50 and CE-58 models does not indicate the year(s) to which the figures apply, although it can be assumed that the cost of producing the hardware and the software for automatic PETs has decreased over time. In any event, the ITA did not rely on cost in its analysis, but the record does indicate that advances in technology have enabled manufacturers to offer features to consumers that once were available only on more expensive office equipment. And to offer such features on PETs within a price range affordable to larger numbers of consumers can hardly remove those machines from the class or kind of merchandise that has been under review.

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[53] *See, e.g.,* S.R.Doc. 21, Exhibit 22 at 16.

[54] *See* R.Doc. 343, pp. 83–86.

[55] *See* S.ConfDoc. 5, Exhibit 3A.

[56] *See id.,* Exhibit 3B.

[57] *See* S.R.Doc. 13, pp. 18–19; Brother Memorandum, p. 50.

[58] *See id.* at 17. The plaintiff contends that the figures given should be allocated over the total number of typewriters produced to reflect unit cost. By its estimate, that cost is about $1.00. *See* S.R.Doc. 27, pp. 13–14.

F

In summary, the information relied upon by the ITA in its *Diversified Products* analysis, as well as the arguments presented by the parties, do not amount to substantial evidence in support of the determination that the typewriters at issue are not within the class or kind of merchandise covered by the 1980 antidumping-duty order. While the record does indicate that text memory is another technologically-advanced feature of a continually evolving product, that feature does not make an automatic PET something other than "a machine with a manually operated keyboard which produces characters like those of a letterpress as a substitute for handwriting" and which is "customarily sold at retail with a carrying case", to refer to the International Trade Commission's definition of a PET for its investigation.

While recognizing that the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence",[59] the court is not persuaded that that is the case here. Though voluminous, the overall record simply does not provide the support for the critical factors underlying[60] the challenged determination.

IV

In view of the foregoing, the determination of the ITA after remand that portable electric typewriters incorporating calculators are within the scope of the *Antidumping Duty Order on Portable Electric Typewriters from Japan,* 45 Fed.Reg. 30,618 (May 8, 1980), is supported by substantial evidence on the record and is in accordance with law, but the determination of the agency after remand that portable electric typewriters with text memories are not within the scope of the aforesaid antidumping-duty order is not supported by substantial evidence on the record, and that determination is therefore hereby reversed and the ITA is directed to issue a redetermination that portable electric typewriters with text memories are within the scope of the aforesaid antidumping-duty order.

SO ORDERED.

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[59] *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966).

[60] *Shell Oil Co. v. Federal Energy Regulatory Commission,* 707 F.2d 230, 235 (5th Cir. 1983).

(Slip Op. 88–128)

NICHIMEN AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–01–00047

Before CARMAN, *Judge.*

[Plaintiff's motion for summary judgment or, in the alternative, judgment on the pleadings, denied; defendant's cross-motion for summary judgment denied.]

(Dated September 22, 1988)

Arvey, Hodes, Costello & Burman, (*Ralph A. Mantynband,* on the motion) for the plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (*Velta A. Melnbrencis,* on the motion) for the defendant.

OPINION

CARMAN, *Judge:* Plaintiff moves for summary judgment or, in the alternative, judgment on the pleadings. Plaintiff claims a refund of $72,919.83 paid to the United States for additional liquidated dumping duties on entries of television receivers.

Defendant opposes plaintiff's motion for summary judgment upon the grounds that this Court lacks subject matter jurisdiction to entertain plaintiff's claim in an action pursuant to 28 U.S.C. § 1581(a) and claims that the United States is entitled to judgment as a matter of law. Defendant cross-moves for summary judgment upon the grounds that there are no material facts in issue and defendant is entitled to judgment as a matter of law.

BACKGROUND AND FACTS

Plaintiff is the importer of television receivers manufactured in Japan. The ten sets in question were imported between May and November of 1976, during a time when imports of Japanese television receivers were subject to an antidumping order issued by the Treasury Department in March of 1971 (T.D. 71–76, 5 Cust. Bull. 151). The receivers were released prior to formal entry under a special delivery permit, accompanied by an immediate consumption and entry bond. The amount of duties, both normal customs and antidumping duties, were estimated at a combined rate of 9% *ad valorem.* The goods were released into the stream of commerce between May and November, 1976.

On August 15, 1986, approximately ten years after importation, the entries were liquidated and a 3.37% *ad valorem* antidumping duty was assessed. Plaintiff paid the duties assessed and filed a protest of the liquidation on or about September 19, 1986. The protest was denied and plaintiff then filed a summons and complaint commencing this action in January 1987.

Discussion

Summary judgment may be granted under Rule 56 of the rules of this Court if "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law * * *." *Chrysler Corporation* v. *United States*, —— CIT ——, 664 F. Supp. 527, 530 (1987) (citing *SRI International* v. *Matsushita Electric Corporation of America*, 775 F.2d 1107, 1116 (1985)). Similarly, under Rule 12(c) of the rules of this Court, judgment on the pleadings "must be granted if there are no disputed facts and the movant is clearly entitled to judgment as a matter of law." *C. J. Tower & Sons of Buffalo, Inc.*, v. *United States*, 343 F. Supp. 1387, 1390 (Cust. Ct. 1972) (citing *Edmonds* v. *United States*, 148 F. Supp. 185 (E.D. Wisc. 1957).

In this case, summary judgment and judgment on the pleadings must be denied since there are material questions of fact which are in dispute. Plaintiff contends that a certain settlement agreement entered into by agencies of the defendant United States and Montgomery Ward, but to which plaintiff was not a party, was nevertheless intended to affect the rights of plaintiff. On the other hand, defendant maintains that the settlement agreement was never intended to settle or compromise claims that the United States had against plaintiff. The dispute as to the intent of the parties to the settlement agreement presents a material question of fact that the litigants in this action should be permitted to present to the trier of facts.

Another issue centers on whether certain receivers were inspected by Customs officials. Plaintiff contends that the goods were not physically before the Customs inspector when the sets were appraised, resulting in a void appraisal. Defendant claims the appropriate Customs officer performed whatever inspection or examination was deemed necessary in order to determine the nature of plaintiff's imports whether the sets conformed to the invoice description. Such material issues of fact should be left to the determination of the trier of facts.

Defendant, in cross-moving for summary judgment, urges that this Court lacks jurisdiction over plaintiff's challenge to the assessment of antidumping duties. Defendant's application is denied with leave to renew.

Conclusion

In view of the foregoing, plaintiff's motion for summary judgment or, in the alternative, for judgment on the pleadings is denied. Further, defendant's cross-motion is denied.

So ordered.

(Slip Op. 88–129)

CHAPARRAL STEEL CO., PLAINTIFF, LTV STEEL CO., AND INLAND STEEL CO., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, NORSK JERNVERK A.S., DEFENDANT-INTERVENOR

Court No. 85–12–01767

Before CARMAN, *Judge.*

[Remanded to ITC.]

(Decided September 28, 1988)

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr., Robert E. Nielson,* and *Lynn S. West* on the motion) for the plaintiff.

Cravath, Swaine & Moore (*Alan J. Hruska* and *Robert L. Nowicki* on the motion) for the plaintiff-intervenors.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel, United States International Trade Commission (*Charles H. Nalls* on the motion) for the defendant.

Cadwalader, Wickersham & Taft (*Frederick P. Waite, E. Charles Rowan, Jr.,* and *Arnold B. Podgorsky* on the motion) for the defendant-intervenor.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Plaintiff, Chaparral Steel Company [Chaparral], and plaintiff-intervenors, LTV and Inland Steel Companies [collectively referred to as plaintiffs] seek review of the final negative injury determination by the United States International Trade Commission [ITC or Commission] in *Carbon Steel Structural Shapes From Norway,* Inv. No. 731–TA–234 (Final), USITC Pub. No. 1785 (November, 1985) [*Final Determination*]. Plaintiffs contend the record below contains substantial evidence that dumped and/or subsidized structural shapes from Norway, Poland, Spain, and South Africa are a cause of material injury and threat thereof to the domestic industry. They urge the determination is not in accordance with law because the ITC failed to consider statutory causation criteria and instead substituted other criteria inconsistent with the statute and regulations. They further dispute the ITC's decision not to cumulatively assess the volume and price effects of imports from Poland, Spain, and South Africa in accordance with § 612(a)(2)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(C)(iv) (1982).

In regard to the issue of cumulation, the Court finds that the ITC misinterpreted § 1677(7)(C)(iv) and accordingly made an erroneous decision not to consider the effects of the dumped and/or subsidized imports from Poland, Spain, and South Africa. The proper test is whether during the period in which the ITC evaluates injury, there are other imports of the like product that are subject to investigation pursuant to the antidumping or countervailing duty laws. The term subject to investigation must be interpreted by reference to the timeframe of the investigation of injury. The status of the proceedings on vote day, the date on which a final determination of in-

jury is rendered, is irrelevant to the analysis. In the present case, the Norwegian injury investigation supplies the frame of reference for the determination of whether cumulation is appropriate. Like imports from Poland, Spain, and South Africa subject to findings of dumping and/or subsidies were present in the market and "subject to investigation" at the time of the Norwegian injury investigation and accordingly all meet the statutory test.

Because of the disposition of this action the Court finds it unnecessary to reach the remaining issues raised by plaintiff regarding causation and threat of material injury. It may well be that these issues will be treated differently on remand of this action and on proper application of the cumulation provision.

Facts

Chaparral, on behalf of the domestic industry producing carbon steel structural shapes [structural shapes], filed an antidumping duty petition with both the ITC and the International Trade Administration [ITA] on December 19, 1984. Chaparral alleged that structural shapes from Norway and Poland were being sold at less-than-fair-value [LTFV] within the meaning of section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 (1982).

On February 4, 1985, the ITC rendered a preliminary determination that there was a reasonable indication of material injury, or threat thereof to the domestic industry by reason of structural shapes from Norway and Poland. *See Certain Carbon Steel Products from Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden, and Venezuela,* Inv. Nos. 701–TA–225–34, 731–TA–213–17, 219, 221–26, 228–35 (Prelim.), USITC Pub. No. 1642 (Feb. 1985). The injury analysis covered the period 1982 through June, 1985. Thereafter, the ITA made a preliminary determination of dumping. It found a 59.96 percent dumping margin with respect to Polish imports, *see* 50 Fed. Reg. 23329 (June 3, 1985), and an 8.62 percent dumping margin with respect to Norwegian imports, *see* 50 Fed. Reg. 23326 (June 3, 1985).

On July 11, 1985, Poland and the United States entered into a Voluntary Restraint Agreement [VRA] whereby Poland agreed to reduce significantly exports of steel products including structural shapes to the United States. On July 19, 1985, counsel for Chaparral sent a letter of understanding to the Commerce Department asserting its belief that the restraint agreement with Poland would have equivalent or better results than a final order. Chaparral also asserted its entitlement to construe the VRA as the "functional equivalent of a suspension of an investigation where there is agreement on the part of the exporters to eliminate the injurious effect of sales at less-than-fair-value as provided in Section 734(c) of the 1979 Trade Agreements Act." Reply Memorandum of Plaintiff in Support of Motion for Judgment on the Agency Record at Annex C, p.

2, *Chaparral Steel Co.* v. *United States* (No. 85–12–01767) [Chaparral's Reply]. On July 24, 1985, the ITC received a letter from Chaparral in which Chaparral withdrew "without prejudice" its petition in the concurrent investigation of structural shapes from Poland. Had Chaparral not withdrawn its petition, presumably, the VRA with Poland would not have gone into effect to the detriment of domestic producers in all sectors of the steel industry.

By notice published August 7, 1985, *see* 50 Fed. Reg. 31931, and August 8, 1985, *see* 50 Fed. Reg. 32101, the ITC and the ITA, respectively, terminated the Polish structural shapes investigation. The Polish investigation was terminated just prior to a final determination by the ITA of LTFV sales of the subject merchandise.

During August of 1985, the ITA postponed its final antidumping duty determination with regard to the Norwegian structural shapes. The ITC thereupon revised its schedule for investigation to coincide with the ITA determination. *See* 50 Fed. Reg. 32758 (Aug. 14, 1985).

The ITA subsequently determined on October 16, 1985, that imports of structural shapes from Norway were being sold at LTFV by a margin of 13.7 percent. *See* 50 Fed. Reg. 42975 (Oct. 23, 1985). In its final negative determination, the ITC concluded that, while the domestic structural shapes industry was experiencing material injury, there was a lack of causal nexus between this injury and the LTFV imports from Norway. The ITC further found there was no real or imminent threat of material injury to the domestic structural shapes industry. In reaching this determination, the ITC refused to cumulatively assess the volume and price effects of the Polish imports of the like product.

The ITC also refused to cumulatively assess the volume and price effects of dumped Spanish structural shapes as well as subsidized Spanish and South African structural shapes subject to countervailing duty orders.

With regard to dumped Spanish structural shapes, an action was commenced on February 10, 1984 by a petition filed by United States Steel Company. This petition resulted in a final affirmative determination of dumping during December, 1984. *See* 49 Fed. Reg. 48582 (Dec. 13, 1984). On January 18, 1985, Spain and the United States entered into a VRA. United States Steel Company thereupon withdrew its petition against Spain, and the ITC investigation of these imports was terminated. *See* 50 Fed. Reg. 4276 (Jan. 30, 1985).

With regard to subsidized Spanish and South African structural shapes, countervailing duty orders became effective on January 3, 1983, and September 7, 1982, respectively. Both orders were revoked effective October 1, 1984 pursuant to the conclusion of restraint agreements. With respect to South Africa, however, the ITA found that subsidies would apply through 1992. *See* 47 Fed. Reg. 39379, 39380 (Sept. 7, 1982). In regard to Spain, the ITA found that

subsidies in the form of three infusions of capital in excess of losses would continue through 1992, 1994, and 1995, respectively. The ITA further found that several other types of subsidies would apply at least through 1986. *See* 47 Fed. Reg. 51438, 51440–44, 51450–53 (Nov. 15, 1982).

In the final negative determination in the Norwegian investigation, the ITC reasoned that the unfairly traded imports must meet three criteria in order to qualify for cumulative analysis: (1) they must compete with both other imports and the domestic like product; (2) they must be subject to investigation; and (3) they must be marketed within a reasonably coincidental period. *Final Determination*, USITC Pub. No. 1785 at 7. In applying this criteria, the ITC determined that allegedly dumped imports from Poland and Spain did not qualify for cumulation since the investigations were terminated by withdrawal of petitions prior to any final determination as to whether the imports were unfairly traded:

> Both Poland and Spain have entered voluntary restraint agreements (VRAs) with the United States. The antidumping investigations regarding imports from these countries of the products at issue in the instant investigations were terminated as a result of the withdrawal of the petitions. The terminations occurred prior to any final determinations as to whether the imports were unfairly traded. The statute does not require cumulation in such circumstances. Because these imports have not been and will not be determined to be unfairly traded and because they are not subject to a pending investigation, we conclude that it is not appropriate to include them in any cumulative analysis.

Id. at 8 (footnotes omitted).

In regard to imports of structural shapes from South Africa and Spain subject to countervailing duty orders, the ITC gave three reasons for its refusal to cumulatively assess the volume and price effects of the relevant imports:

> As we have previously stated, we believe that it is not appropriate to cumulate across countervailing duty and antidumping investigations, and have declined to do so. Further, we note that the CVD orders in question are remote in time, and the unfairly traded imports which were subject to the investigations resulting in those orders did not enter the U.S. market reasonably coincident in time with the imports currently under investigation.

Id. at 8–9 (footnotes omitted).

Background

In making a final determination in an antidumping investigation, the ITC must ascertain whether any material injury being suffered

by the domestic industry has been caused by "imports, or sales (or the likelihood of sales) for importation." 19 U.S.C. § 1673d(b)(1) (1982). Material injury is further defined as harm that is not "inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

In analyzing the causal nexus between the condition of the domestic industry and the imports under investigation, the ITC must consider, among other factors, the volume of the imports, the effect of the imports on prices in the United States for like products, and the impact of the imports on the domestic producers of like products. 19 U.S.C. § 1677(7)(B) (1982).

By the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 [Trade Act], Congress added a provision requiring the ITC to cumulatively assess the volume and price effects of imports from two or more countries when specific criteria are satisfied. The subsection as enacted provides as follows:

> **(iv) Cumulation.**—For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C.A. § 1677(7)(c)(iv) (1980 & Supp. 1985). The Commission is therefore required to cumulate from countries the volume and price effects: (1) of like products subject to investigation; (2) if such imports compete with each other and with the like products of the domestic industry.[1]

Prior to the addition of § 1677(7)(C)(iv), the ITC determined whether or not to cumulate on a case-by-case basis without any statutory guidance. Congress mandated cumulation "to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries." H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5220.

Of final importance to the background of this case is the standard governing review. This Court may set aside a final determination by the Commission if it concludes that the determination is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law" within the meaning of section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B) (1982). The Court will now turn to a discussion of the issues of this case.

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[1] Defendant and defendant-intervenors contend cumulation depends upon an additional factor, namely that the imports be "reasonably coincident." In support of this proposition, the defendant and defendant-intervenor refer to language contained in the Conference Report accompanying the Trade Act. *See* H.R. Rep. No. 1156, 98th Cong., 2nd Sess. 173, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5220. A fair reading of § 1677(7)(c)(iv), the Report, and other portions of the legislative history, however, provide insufficient support for this proposition. For further amplification of this point, see discussion below.

Discussion

As previously stated, Chaparral filed a petition on December 19, 1984 alleging dumping by both Poland and Norway. Antidumping duty investigations concerning structural shapes from these countries were commenced on the same day. The ITC's injury analysis focused on the period from 1982 through June, 1985. Preliminary determinations of dumping by both countries were thereafter rendered. On July 11, 1985, one month after the period of investigation of injury by the ITC in the Norway action and one month after the issuance of the preliminary determinations, pursuant to the President's Steel Program, *see Steel Import Relief Determination,* 49 Fed. Reg. 36813 (Sept. 20, 1984), the United States and Poland entered into a VRA. As a condition to the Agreement, Chaparral was required to withdraw its petition against Poland. The ITC refused to cumulatively assess the volume and price effects of the Polish imports because the imports had not been and would not be determined to be unfairly traded and were not subject to a pending investigation.

Plaintiffs contend the ITC should have cumulatively assessed the volume and price effects of the imports from Poland for the purposes of determining material injury and threat thereof to the domestic industry by reason of unfairly traded imports. The defendant and defendant-intervenor, by contrast, contend that cumulation was not warranted because Polish imports were no longer "subject to investigation" at the time the ITC rendered a final determination of injury on the Norwegian petition.

In determining whether or not Polish imports should have been cumulated, the central focus is on the term "subject to investigation" embodied but not defined in the statutory cumulation provision. As held by the United States Court of Appeals for the Federal Circuit in an analogous situation, the term "investigation" must be construed in light of congressional intent. *See A1 Tech Specialty Steel Corp.* v. *United States,* 3 Fed. Cir. (T) 1, 745 F.2d 632 (1984). Furthermore, while an agency's interpretation of a statute it administers is entitled to deference if reasonable and not in conflict with legislative intent, no deference is entitled to an interpretation that is plainly inconsistent with the express language of the statute, its purpose, and the legislative intent. *See Board of Governors, Fed. Reserve Syst.* v. *Dimension Fin. Corp.,* 474 U.S. 361, 368 (1986).

The Conference Report accompanying the Trade Act offers little assistance as to the meaning of the term "subject to investigation;" the Report merely repeats the term without embellishment:

> The provision requires cumulation of imports from various countries that each account individually for a small percentage of total market penetration but when combined may cause material injury. The conferees do intend, however, that the marketing of imports that are accumulated [sic] be reasonably coin-

> cident. Of course *imports of like products from countries not subject to investigation would not be included in the cumulation.*

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 173, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5220 (emphasis supplied). Although the House Ways and Means Committee in a report accompanying the Trade Act also did not define the term "subject to investigation," the Committee afforded valuable insight about the purpose and the legislative intent of the mandatory cumulation provision:

> The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries. Most Commissioners have applied cumulation under certain circumstances but have articulated a variety of differing criteria and conditions. However, cumulation is not required by statute. In addition, a few Commissioners have imposed conditions which do not seem justified to the Committee.
>
> The Committee believes that the practice of *cumulation is based on the sound principle of preventing material injury which comes about by virtue of several simultaneous unfair acts or practices.* The Committee amended the criteria to permit cumulation of imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury. The requirement in the bill as introduced that imports from each country have a "contributing effect" in causing material injury would have precluded cumulation in cases where the impact of imports from each source treated individually is minimal but the combined impact is injurious. The Committee does intend, however, that the marketing of imports that are cumulated be reasonably coincident. Of course, imports of like products from countries not subject to investigation would not be included in the cumulation.

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5164 (emphasis added).

In light of the above, the Court finds the defendant's and the defendant-intervenor's literal, plain meaning approach to the cumulation provision contravenes the purposes and clearly articulated legislative intent of the cumulation provision. In one of the earliest cases dealing with cumulation, cumulation was held to embrace the policy of redressing the "collective hammering effect" due to the imports of new sources of supply "after avenues of dumping already utilized [have] been closed by enforcement of the antidumping statute." *See City Lumber Co.* v. *United States,* 64 Cust. Ct. 826, 829–30, A.R.D. 269, 311 F. Supp. 340, 343 (1970), *aff'd,* 59 CCPA 89, C.A.D. 1045, 457 F.2d 991 (1972). In a more recent case, this Court noted

that Congress elected to mandate cumulation in broad terms. *See Bingham & Taylor, Div.* v. *United States,* —— CIT ——, ——, 627 F. Supp. 793, 797 (1986), *aff'd,* 815 F.2d 1482 (1986). As Congress specified that "cumulation is based on the sound principle of preventing material injury which comes about by virtue of several simultaneous unfair acts or practices," *see* H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5164, it is clear that Congress did not intend the ITC to focus on the procedural status of a "simultaneously unfair act or practice" on the date that a vote on material injury is rendered. The proper test under § 1677(7)(c)(IV) requires an evaluation of injury on a cumulative basis with the present investigation supplying the frame of reference for decision. *See Republic Steel Corp.* v. *United States,* 8 CIT 29, 34, 591 F. Supp. 640, 645 (1984) ("the proper test for cumulation is whether subsidized or allegedly subsidized imported products are competing with the product of a domestic industry during a period when the effect of these importations is being felt by the domestic industry"), *reconsideration denied,* 9 CIT 100 (1985), *rev'd on other grounds, American Lamb Co.* v. *United States,* 4 Fed. Cir. (T) 47, 785 F.2d 994 (1986).

During the period 1982 through June, 1985, Polish structural shapes were subject to investigation by the ITC, pursuant to a petition filed simultaneously with the Norwegian petition. A preliminary determination regarding Polish structural shapes was rendered before the VRA was consummated and subsequent to the period investigated for dumping. The unfair margin of dumping for Polish structural shapes was high, nearly 60 percent. That Poland entered into an agreement to restrain imports after the period of investigation in no way diminishes or eliminates the debilitating and "collective hammering effect" of Polish imports on the domestic industry during the period of investigation, "a time when the effect of these importations [was] being felt by the domestic industry." *Republic Steel,* 8 CIT at 34, 591 F. Supp. at 645. As the Court recognized in *Bingham & Taylor, Div.,* —— CIT at ——, 627 F. Supp. at 798, "Congress clearly tipped the scale in favor of the domestic industry and against any country engaging in unfair trade practices." The defendant's and the defendant-intervenor's attempt to impose a rigid and literal interpretation on the cumulation provision seeks to elevate form over substance and is in clear contravention of the legislative intent.

The defendant and defendant-intervenor argue, however, that in the absence of a final ITA determination of dumping by Poland, there is no foundation for the conclusion that Poland has contributed to injury. In their view, Title VII "is a remedy targeted at a specific type of injury caused by unfair import competition," and that therefore, "[a]bsent a finding to the contrary, the Commission presumes imports to be fairly traded." Defendant's Memorandum in Response to Plaintiff's Motion for Judgment on the Agency Record

at 42 n.94, *Chaparral Steel Co.* v. *United States,* (No. 85–12–01767) (citing H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979)). While a presumption of fairness may be entitled to the imports of a particular country, the Court finds that the absence of a final determination of dumping is not dispositive of the issue whether cumulation is appropriate. The existence of a preliminary determination of dumping and conversely, the absence of a final determination, affects the weight and credibility of the evidence presented, not its overall relevance. A preliminary finding of dumping is less than perfect information; however, such a finding is the only information in existence. Furthermore, although Title VII presumes imports to be fairly traded, a finding of dumping, albeit one that is preliminary, is sufficient to overcome that presumption and render those imports potential candidates for cumulation.

The defendant further urges that the withdrawal of a petition for import relief restores the situation to the *status quo ante.* In other words, the defendant argues, when Chaparral withdrew its petition for relief against Polish structural shapes, it was as if the investigation had never occurred. The defendant attempts to draw a parallel between withdrawal of a petition and a dismissal without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure. Under Rule 41(a)(1), continues the defendant, the dismissal leaves the matter in the same situation as if the action had never been filed. In a dismissal "without prejudice under Rule 41(a)(1)," however, no preliminary findings or official rulings could have been made prior to the withdrawal of a complaint without resultant prejudice. In the case at bar, there is no dispute that the ITC made a determination, albeit one that was preliminary, of dumping by Polish structural shapes. The existence of the VRA and the withdrawal of a petition do not alter the fact that Polish imports were preliminarily found to have been dumped on the domestic market. Further, the VRA merely affords prospective relief. Its existence does not *ab initio* deny the effect of unfairly traded imports before that time.

There is no dispute that in withdrawing its petition for import relief against imports from Poland that Chaparral acted voluntarily but in compliance with the VRA. Chaparral, however, conditioned withdrawal of its petition against Poland in a letter of understanding to the Commerce Department. In this letter, Chaparral expressed entitlement "to construe the Arrangement as the functional equivalent of a suspension of an investigation where there is agreement on the part of the exporters to eliminate the injurious effect of sales at less than fair value as provided in Section 734(c) of the 1979 Trade Agreement Act." Chaparral's Reply, *supra,* at Annex C. pp. 1–2. The ITC should not now be permitted to argue that Chaparral should be prejudiced by the withdrawal of the petition.

Finally, policy considerations support the finding that withdrawal of a petition pursuant to a VRA should not be determinative of the issue of cumulation. The relevant inquiry focuses on an evaluation

of the simultaneous unfair acts or practices that have a "collective hammering" effect on the domestic industry during the investigatory period. If withdrawal of a petition jeopardizes the possibility of cumulation with like and competing imports from other countries, then the incentive to cooperate in a bilateral trade agreement would be greatly reduced. Similarly, if the imported products of a particular country will not be subject to cumulation due to the conclusion of a VRA with other countries, then that country will receive a windfall through continued dumping for failing to conclude a VRA.

The plaintiffs also contend that the ITC incorrectly concluded that the antidumping duty investigation of Spanish steel was terminated by the withdrawal of a petition pursuant to a VRA prior to any final determination of dumping. In their view, this antidumping proceeding *in fact* culminated in a final affirmative ITA determination of dumping in December, 1984. *See* 49 Fed. Reg. 48582 (Dec. 13, 1984). Therefore, they urge, the ITC made a mistake in fact and thus erred in rejecting cumulation on that ground. The defendant and the defendant-intervenor do not address this allegation of error. They simply maintain that in the absence of a final determination of dumping, there can be no presumption of unfair trade under Title VII. They further urge that since the antidumping duty investigation of Spanish steel was terminated prior to the date of the final determination regarding Norwegian steel, these imports were not longer "subject to investigation" at the relevant time, and that therefore cumulation was not warranted.

As previously stated, the domestic industry commenced an antidumping proceeding against Spanish structural shapes in February, 1984. This investigation, as established by the record presented for review in this case and contrary to the assertions of the defendant and defendant-intervenor, resulted in a *final* affirmative determination. In fact, this final determination was rendered in December 1984, at a time coinciding with the investigatory period of injury due to Norwegian structural shapes. Thus, the defendant's concern that the statutory purpose underlying Title VII would not be served by factoring presumptively fairly traded imports into the cumulation assessment is unfounded.

Furthermore, although the Spanish antidumping investigation was terminated in January, 1985, *see* 50 Fed. Reg. 3949 (Jan. 29, 1985), dumped Spanish structural shapes were present in the market and "subject to investigation" for virtually the entire period of investigation of Norwegian structural shapes. It is this period that supplies the relevant frame of reference for the term "subject to investigation." The mere fact that the Spanish antidumping investigation was terminated prior to "vote day," the day the final determination was rendered in the Norway investigation, is *not* determinative of the issue of cumulation. Congress intended to prevent material injury which comes about by virtue of several simultane-

ous unfair acts or practices. H.R. Rep. No. 725, 98th Cong. 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5164. The remedy was intended to reach those imports at a time when the effect of these imports are felt by the domestic industry. *See Republic Steel Corp.*, 8 CIT at 34, 591 F. Supp. at 645. Thus, the relevant inquiry is whether unfairly traded imports are present in the market and subject to investigation during the period of investigation concerning material injury to the domestic industry. There can be no question that Spanish structural shapes were present in the domestic market and subject to investigation during a good portion of the period investigated for material injury by the Norwegian structural shapes.

Plaintiffs also challenge the ITC's rejection of cumulation of certain subsidized imports of the like product from Spain and South Africa which were subject to countervailing duty orders. They challenge the conclusion that these imports were not "reasonably coincident" in time with the imports from Norway and that these countervailing duty orders were remote in time. In defending the determination, both the defendant and defendant-intervenor contend that since these orders became effective in 1982 for South Africa, *see* 47 Fed. Reg. 39379 (Sept. 7, 1982), and 1983 for Spain, *see* 50 Fed. Reg. 51 (Jan 3, 1983), the imports were not "subject to investigation" in a period reasonably coincident with the Norwegian structurals which did not enter the United States until one year after these orders became effective. In fact, they continue, the countervailing duty orders covering Spanish and South African structural shapes were revoked effective October 1, 1984, three-quarters of the way through the first year of measurable imports from Norway.

Of central concern to the Court is the allegation by the defendant and the defendant-intervenor that § 1677(7)(C)(iv) requires, in addition to the stated criteria, that the imports be reasonably coincident with the imports under investigation. This requirement, they urge, stems from the following language contained in the Conference Report accompanying the Trade Act:

> The provision requires cumulation of imports from various countries that each account individually for a small percentage of total market penetration but when combined may cause material injury. The conferees do intend, however, that *the marketing of imports that are accumulated [sic] be reasonably coincident.*

H.R. Rep. No. 1156, 98th Cong., 2d Sess. 173, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5220, 5290 (emphasis added). In their view, this language suggests the existence of a third factor in the cumulation assessment of § 1677(7)(C)(iv).

While this Court must give substantial weight to a reasonable agency interpretation, *American Lamb Co.* v. *United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citing *Zenith Radio Corp.*

v. *United States*, 437 U.S. 443, 450–51 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964), *reh'g denied*, 380 U.S. 989 (1965)), no deference is entitled to a plainly erroneous legal interpretation. The Court finds that neither the language of the statute nor its legislative history support the contention that Congress intended "reasonable coincidence" to operate as a separate, discrete requirement for cumulation.

Language requiring that the imports to be cumulated be reasonably coincident was contained in the original House bill. *See* H.R. 4784, 98th Cong., 2d Sess. § 105(a)(2), 130 Cong. Rec. 7948–49 (1984). This language, however, was not contained in the House Committee on Ways and Means version of the cumulation provision. *See* H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5127. While this language reappeared in the Senate version of the House bill, the amended House version was adopted in Conference. *See* H.R. Rep. No. 1156, 98th Cong., 2d Sess. 173, *reprinted in part in* 1984 U.S. Code Cong. & Admin. News 4910, 5220. Thus, while Congress contemplated a third requirement that the marketing of imports be reasonably coincident, reasonable coincidence as a distinct requirement for cumulation was rejected.

The Conference Report from which this alleged requirement derives provides that "the *marketing* of imports that are accumulated [sic] be reasonably coincident." This language is more plausibly construed as an explanation of the statutory requirement that the imports *compete* with the like products of the domestic industry in the United States market. If the marketing of imports is not reasonably coincident with the imports under investigation, then the likely inference is that the imports do not compete with each other and are not joint contributors of the "collective hammering" effect cumulation is intended to redress. Thus, the pertinent language of the Conference Report cannot be construed as evidence of a third factor for consideration but must be considered an explication of one of the statutory factors in the cumulation assessment.

The defendant also argues that the imports from Spain and South Africa subject to countervailing duty orders were not subject to investigation in a period simultaneous with those from Norway or even in a period reasonably coincident with the investigation of Norwegian structural shapes, which did not enter the United States in measurable amounts until one year after the countervailing duty orders were issued. They further urge the orders were too remote in time to warrant cumulation.

Citing language contained in a *summary* of the cumulation provision in the House Committee Report accompanying the Trade Act, the defendant contends Congress intended the cumulation of like imports from two or more countries subject to *simultaneous* investigation. *See* Defendant's Memorandum, *supra*, at 44 n.98 (citing H.R. Rep. No. 725, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. Code

Cong. & Admin. News 4910, 5127, 6164). Although the summary provides that cumulation is mandatory for countries subject to "simultaneous investigation," simultaneous is more properly understood as modifying the term unfair act or practice. *See* H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5127, 5164. *See also Bingham & Taylor, Div.*, 815 CIT at 1485, 627 F. Supp. at 796; *Bingham & Taylor, Div.*, 815 F.2d at 1485. Further, while Congress mandated cumulation of imports subject to investigation, imports are undoubtedly "subject to investigation" within the meaning of 19 U.S.C. § 1677(7)(C)(iv) when like imports from several countries enter the United States at the same time, are beneficiaries of unfair acts or practices, and when the domestic industry files petitions simultaneously.

The legislative history also establishes that the marketing of imports, not the *investigations* be reasonably coincident in time. There can be no dispute that imports from Spain and South Africa were present in the market for virtually the entire period of investigation of Norwegian structurals. When, in 1984, measurable imports from Norway were first recorded, like imports from Spain and South Africa were present and marketed in the United States. The marketing of these imports was therefore reasonably coincident. Thus these imports competed with the imports from Norway and were relevant to the cumulation inquiry.

It is not relevant, however, that both the Spanish and South African Steel investigations culminated in countervailing duty orders prior to the date on which a final determination was rendered in the Norwegian investigation.[2] A finding of reasonable coincidence in the marketing of imports is not precluded by the issuance of a countervailing duty order. Further, the remoteness in time of an order is not determinative under the cumulation provision. For example, in the present case, subsidy findings pertaining to Spain and South Africa were still in effect during most of the period of investigation of Norwegian structurals. As the ITC found in regard to South Africa, subsidies in the form of assumptions of finance charges by the South African government would apply through 1992. 47 Fed. Reg. 39379, 39380 (Sept. 7, 1982). With regard to Spain, the ITC determined that subsidies in the form of three infusions of capital in excess of losses would apply through 1992, 1994, and 1995. The ITC also found subsidies in the form of preferential loans and loan guarantees granted during 1977 through 1981. Presumably, some portion of these subsidies once allocated over the term of the loans would apply through 1986, if not later. 47 Fed. Reg. 51438, 51440–43, 51451–52 (Nov. 15, 1982).

[2] It is interesting to note that a Senate provision that would have required cumulation of imports from countries subject to final orders as well as from countries under investigation was rejected in favor of the House language that the imports to be cumulated be "subject to investigation." *See* H.R. Rep. No. 1156, 98th Cong., 2d Sess. 173, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5290. This would tend to support the view that Congress has "removed the limitation regarding final orders contained in the Senate version of the provision." *See* USITC General Counsel Memorandum GC–H–060 (April 1985).

The cumulation of imports subject to antidumping or countervailing duty orders would also appear to be supported by at least one memorandum of the ITC General Counsel, the pertinent provisions of which provide as follows:

> We are of the opinion that the term "subject to investigation," as used in the statute, encompasses both imports which are alleged to be unfairly traded and imports subject to a finding that they are unfairly traded. We believe that Congress intended that the Commission cumulatively analyze the volume and effect of both imports subject to a final antidumping or countervailing duty order entered within a reasonable time of entry into the United States market of the imports under investigation, and imports currently under investigation. Limiting the availability of a cumulative analysis to imports being investigated concurrently would require, in effect, that the domestic industry file all petitions involving a particular product at the same time. Moreover, the effect of unfairly traded imports on the domestic industry and on the United States market does not dissipate immediately upon entry of an antidumping or countervailing duty order. Thus, the collective adverse effect of unfairly traded imports on the domestic industry, which is the basic rationale for a cumulative analysis, continues for some period of time after an antidumping or countervailing duty order is entered. We are of the opinion that the Commission should base its decision whether to cumulate imports subject to an outstanding antidumping or countervailing duty order with imports currently being investigated on the particular facts of each case, taking into consideration the length of time the order has been in effect and its effect on conditions in the domestic industry.

Administrative Record, Doc. 77 at 9–19, *United States Steel Corp.* v. *United States* (Court No. 85–03–00384) (footnote omitted). Since the ITC concedes that the effect of unfairly traded imports on the domestic industry does not dissipate immediately upon entry of an antidumping or countervailing duty order, and since the ITC found the subsidies in question would continue throughout the period of the Norway investigation, it was error for the ITC to refuse to cumulatively assess the volume and price effects of the imports from Spain and South Africa.

The defendant also argues that the ITC properly decided that it is inappropriate to cumulate across countervailing duty and antidumping investigations. Although the defendant fully briefed the issue of cross-cumulation, this issue has since been decided by the United States Court of Appeals for the Federal Circuit. *See Bingham & Taylor, Div.* v. *United States,* —— CIT ——, 627 F. Supp. 793 (1986), *aff'd,* 815 F.2d 1482 (1986). While it is not necessary to address each argument made by the defendant on the issue of cross-

cumulation, it is instructive to discuss some of the salient points made by this Court and the Federal Circuit in the *Bingham & Taylor* decision.

Bingham & Taylor involved a challenge of a preliminary negative determination of injury to the domestic light iron construction casting industry by reason of subsidized imports from Brazil. The plaintiffs challenged the ITC's decision not to cumulate with the imports from Brazil, the volume and price effects of like imports from Canada, India, and the People's Republic of China subject to simultaneously initiated antidumping investigations. This Court held that cross-cumulation of the volume and price effects of imports subject to antidumping and imports of like products subject to countervailing duty investigations was required.

In affirming the decision of this Court in *Bingham & Taylor,* the Federal Circuit referred to legislative history that cumulation was designed "to eliminate the inconsistencies in the Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries." 815 F.2d at 1485 (citing H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5127, 5164. Concluding that "whether imports are dumped, subsidized, or both does not alter their status as unfair imports," and that Congress mandated cumulation in broad terms, the Federal Circuit ruled that cross-cumulation was required. 815 F.2d at 1486. Because *Bingham & Taylor* requires cross-cumulation in appropriate circumstances, the Court finds the ITC erroneously based its decision not to consider the subsidized imports from Spain and South Africa on the conclusion that cross-cumulation is not required.

Conclusion

For the reasons stated above, the Court holds the ITC erroneously determined not to cumulatively assess the volume and price effects of certain allegedly dumped imports from Poland with the like imports from Norway. The term "subject to investigation" must be interpreted by reference to the timeframe involved in the injury investigation. Since Polish imports were present in the market and "subject to investigation" during the entire period of investigation of injury by Norwegian structural shapes, the ITC erroneously concluded that Polish imports did not warrant cumulative analysis. Although Polish imports had been subject only to a preliminary determination of dumping, the absence of a final determination is not dispositive but merely affects the weight and credibility of the evidence and not its overall relevance.

With regard to the dumped Spanish imports, the ITC erroneously concluded that a final determination of dumping had not been rendered. The ITC therefore erred in rejecting cumulation on this ground. Since dumped Spanish imports were present in the market and "subject to investigation" for virtually the entire period of the

investigation of injury of Norwegian structural shapes, it was also error to conclude that cumulation of Spanish structural shapes subject to a finding of dumping was not warranted.

Finally, the Court holds that Spanish and South African structural shapes subject to countervailing duty orders were present in the market and subject to investigation during the timeframe of the investigation of injury by the Norwegian structural shapes. The mandatory cumulation provision does not require that the investigations be reasonably coincident or that the investigations be simultaneous. Reasonable coincidence refers to the requirement that the imports compete with each other and the like products of the United States as provided at § 1677(7)(C)(iv). The term "simultaneous" refers to the legislative intent to redress material injury brought about by several simultaneous unfair acts or practices. *See* H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5164. Since the Federal Circuit has ruled that § 1677(7)(C)(iv) requires cumulation across antidumping and countervailing duty investigations, the ITC's refusal to cumulatively assess the volume and price effects of imports from Spain and South Africa subject to countervailing duty orders was erroneous.

(Slip Op. 88-130)

UNITED STATES, PLAINTIFF *v.* DAEWOO INTERNATIONAL (AMERICA) CORP. AND DAEWOO CORP., DEFENDANTS

Court No. 87-03-00528

Before NICHOLAS TSOUCALAS, *Judge.*

[Plaintiff's motion for partial judgment on the pleadings granted.]

(Decided September 29, 1988)

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer* and *Jeanne E. Davidson*); of counsel: *Robyn M. Bacon, Charles D. Ressin, Sandra Strempel* and *Kathleen F. McGuigan,* U.S. Customs Service, for plaintiff.

Milbank, Tweed, Hadley & McCloy (*Richard D. Cleary, Edward J. Reilly* and *Stanley J. Marcuss*) for defendants.

MEMORANDUM OPINION

TSOUCALAS, *Judge:* The government alleges defendants fraudulently imported 236 entries of steel and steel products into the United States in violation of 19 U.S.C. § 1592 and seeks to recover $163,065,386.00 assessed in penalties. Plaintiff has moved for partial judgment on the pleadings pursuant to USCIT R. 12(c) claiming defendants are estopped from denying their liability as to nine of

the entries because they had previously pleaded guilty in a criminal action which involved these nine entries.

Defendants oppose plaintiff's motion for partial judgment on the pleadings arguing the Court should not give collateral estoppel effect to the guilty pleas because: (1) no issues were actually litigated in that proceeding; (2) there is a lack of identity in issues between the criminal violations and the civil violations of 19 U.S.C. § 1592; (3) 19 U.S.C. § 1592 requires a full evidentiary hearing; and (4) defendants' affirmative defenses bar plaintiff's recovery. Plaintiff has moved to strike defendants' affirmative defenses and to strike an affidavit of a former Customs' official submitted by defendants in support of their affirmative defenses.

Background

On January 3, 1985, defendants Daewoo International Corporation (Daewoo-America), Daewoo Corporation (Daewoo-Korea), and the president of Daewoo-Korea pleaded guilty to Counts One through Ten of a Superseding Information. *See Plaintiff's Memorandum in Support of its Motion for Partial Judgment on the Pleadings*, Attachments B, C (hereinafter "*Plaintiff's Memorandum*"). In the Information, defendants were charged with knowingly, willfully and unlawfully making and causing to be made material false and fraudulent statements and representations to the United States Customs Service (Customs) and the United States Department of Commerce (Commerce). *Plaintiff's Memorandum*, Attachment B. These statements were made on consumption entries including Special Summary Steel Invoices (SSSI) in connection with the importation of steel in violation of 18 U.S.C. § 1001 (covering false statements) and other Federal Criminal Statutes. In substance, defendants sought to avoid the Trigger Price Mechanism (TPM), which was a means to monitor dumping: if steel was sold below the trigger price, an antidumping duty investigation could be initiated. Defendants submitted false declarations to Customs whereby the sales prices were falsely inflated. A criminal investigation resulted in a 32 Count Grand Jury Indictment against Daewoo-America, Daewoo-Korea, and other individuals. *See Plaintiff's Memorandum*, Attachment A.

Count One of the Information alleged the factual elements of the conspiracy to fraudulently enter steel products:

> A. *INTRODUCTORY ALLEGATIONS:*
>
> * * * * * * *
>
> 6. At all times relevant to this information, importers of various steel products were required, at or near the time of importation, to submit consumption entry documents to the United States Customs Service concerning the importation, including, but not limited to: Consumption Entry forms (Form No. 7501);

Special Summary Steel Invoices (Form No. 5220); Commercial Invoices; and Special Customs Invoices (Form No. 5515).

7. At all times relevant to this information, consumption entry documents filed with the United States Customs Service in connection with an entry of merchandise were required to set forth truthful information concerning the price of the merchandise, including a statement as to whether a rebate has been allowed upon exportation of the merchandise from the foreign country into the United States. Title 19, United States Code, Sections 1481(a) and 1485(a).

8. At all times relevant to this information, the Antidumping Act, Title 19, United States Code, Section 160 *et seq.*, as amended, 19 U.S.C. 1673–1677, provided for the imposition of additional duties, known as dumping duties, if the Government determined that foreign merchandise was being imported into the United States at less than its fair value and that this conduct was injuring an industry of the United States.

9. In an effort to detect possible dumping of foreign steel products and to enforce the provisions of the Antidumping Act, on or about December 30, 1977, the United States Treasury Department announced a program to monitor the prices of steel mill products imported into the United States, which monitoring device was called the Trigger Price Mechanism (TPM). Under the TPM program, administered at various times by the United States Treasury and Commerce Departments, if various steel products imported into this country were sold below a specific price, known as the "trigger price," an anti-dumping investigation could be instituted by the United States. Trigger prices for steel were published by the Department of the Treasury during the period February 1978 to January 11, 1982, with the exception of a six-month period in 1980.

B. *OBJECT OF THE CONSPIRACY*

10. From on or about January 1980 and continuing to or about June of 1982 in the Central District of California and elsewhere, the defendants DAEWOO-KOREA and DAEWOO-AMERICA, knowingly, willfully and unlawfully conspired, combined, confederated and agreed together to commit an offense against the United States; that is, to knowingly, willfully and unlawfully make and cause to be made to the United States Customs Service and the United States Department of Commerce material false and fraudulent statements and representations in connection with the importation of steel products referred to in those consumption entries identified in counts two through ten below in violation of 18 U.S.C. 1001.

C. *MEANS OF THE CONSPIRACY*

In order to further the objects of the conspiracy as set forth in paragraph 10 and to conceal the true prices of these steel product transactions and avoid and evade the proper application of the Trigger Price Mechanism and avoid possible antidumping investigations, the defendants DAEWOO-KOREA and DAEWOO-AMERICA would and did cause falsely inflated sale prices to its American customers to be reported to the United States Customs Service with respect to those consumption entries referred to in counts two through ten, below, and further with respect to those consumption entries;

(1) It was a part of the conspiracy that in order to disguise the actual price of the imported steel products DAEWOO-AMERICA would issue falsely inflated invoices to its unrelated resale customers, and that these inflated invoices would coincide with the falsely inflated prices submitted to the Customs Service;

(2) It was a part of the conspiracy that, even at the time of the entry of the steel and at the time of the issuance of the inflated invoices, DAEWOO-AMERICA would expect its American resale customers to pay only the actual agreed purchase order prices rather than the falsely inflated invoice prices; and

(3) It was a part of the conspiracy that DAEWOO-AMERICA would keep internal records of the difference between the false invoice prices and the actual agreed purchase order prices and would prepare internal credit memoranda to credit customers' accounts for "trigger price difference" amounts.

Plaintiff's Memorandum, Attachment B at 1–5.

Counts Two through Ten describe the individual occurrences in which defendants "did knowingly, willfully and unlawfully make and cause to be made a material false and fraudulent statement and representation on a Special Summary Steel Invoice (Form 5520) * * * (In violation of 18 U.S.C. 1001 and 2)." *Id.* at 6.

Discussion

Plaintiff has moved for partial judgment on the pleadings in connection with the nine entries subject to defendants' guilty pleas. Plaintiff's motion for judgment on the pleadings must be denied if, as against the defendants, any factual issue is raised, but granted if there is no factual dispute and plaintiff is clearly entitled to judgment as a matter of law. *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 377, 379, C.R.D. 72-11, 343 F. Supp. 1387, 1390 (1972). It must appear to a certainty that defendants are not entitled to judgment under any facts that may be proved, viewing

the pleaded facts most favorably toward defendants, and drawing all reasonable inferences thereto. *Id.*; *F.W. Myers & Co.* v. *United States,* 72 Cust. Ct. 133, 135, C.D. 4515, 374 F. Supp. 1395, 1397 (1974). Plaintiff maintains defendants are collaterally estopped from denying liability under § 1592, since defendants' guilty pleas to § 1001 establish the elements of the offense under § 1592.[1]

The basic concept behind collateral estoppel is to preclude relitigation of an issue. Thus, issue preclusion may be invoked where a subsequent action involves the same issue of fact or law which was actually litigated and determined in the first action, where that determination was essential to the previous judgment, and where a full and fair opportunity to litigate the issue was afforded. *See Montana* v. *United States,* 440 U.S. 147, 153 (1979); *also Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 333 (1971): *Cromwell* v. *County of Sac,* 94 U.S. 351, 353 (1877); *Jackson Jordan, Inc.* v. *Plasser American Corp.,* 747 F.2d 1567, 1575–76 (Fed. Cir. 1984) (citing Restatement (Second) of Judgments § 13 (1982)).

Generally, a prior criminal conviction can be used by the government to estop a defendant from denying civil liability in a subsequent proceeding. *Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568 (1951). It has been held that collateral estoppel applies whether the prior criminal proceeding was adjudicated by jury verdict or by guilty plea. *Brazzell* v. *Adams,* 493 F.2d 489, 490 (5th Cir. 1974).

According to defendants, relying on *Haring* v. *Prosise,* 462 U.S. 306 (1983), a plea of guilty means that no issue was actually litigated, therefore, the conviction should not be given collateral estoppel effect. The Supreme Court held that Prosise, after pleading guilty in a prior criminal action, was not collaterally estopped from bringing a § 1983 action against police officers for allegedly violating his Fourth Amendment rights by conducting an unlawful search which gave rise to his arrest. Defendants seize certain language used by the Court, specifically, that "no issue was 'actually litigated,'" *id.* at 316, in the previous criminal action as support for their argu-

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[1] Section 1001 of title 18 provides:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The relevant provisions of 19 U.S.C. § 1592 set forth:

§ 1592. Penalties for fraud, gross negligence, and negligence

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

ment. However, this observation must not be taken out of context. The primary focus of the Court's analysis was on the specific issue sought to be precluded, the legality of the search, which was not litigated and not determined by defendant's plea of guilty, nor was it essential to the judge accepting that plea.[2] *Id.*

Had the Supreme Court desired the result in *Prosise* to signify that a defendant's guilty plea can never be used to estop him from denying liability in a subsequent civil suit, surely its analysis could have ended with the "actually litigated" question. It did not. Instead, the Court's analysis reached each requirement of the collateral estoppel doctrine, including observing that the only issue raised and *determined* by Prosise's guilty plea was that he committed the substantive offense. *Cf. Otherson* v. *Dep't of Justice, INS,* 711 F.2d 267, 275, n.8, 277 n.11 (D.C. Cir. 1983) (where the court recognized that the *Prosise* decision did not finally settle the question and that facts established by a guilty plea may be preclusively established at later civil trials). Therefore, the *Prosise* decision cannot serve, by itself, as a basis for denying the estoppel effect for issues admitted in guilty pleas.

Moreover, subsequent to *Prosise,* other courts have recognized that a guilty plea in a criminal action will establish, for purposes of the subsequent civil proceeding, the facts alleged in the complaint upon which defendant was convicted. *Appley* v. *West,* 832 F.2d 1021, 1025–26 (7th Cir. 1987) (citing *Nathan* v. *Tenna Corp.,* 560 F.2d 761, 763 (7th Cir. 1977)); *Brown* v. *Green,* 738 F.2d 202, 206 (7th Cir. 1984); *see also Battieste* v. *City of Baton Rouge,* 732 F.2d 439, 441 (5th Cir. 1984) (to the extent that collateral estoppel applies, it may be asserted as an affirmative defense in § 1983 action, citing *Prosise,* 462 U.S. 306). It is worth noting that Fed. R. Crim. P. 11(f) requires a court to make "such inquiry as shall satisfy it that there is a factual basis for the plea" before the plea may be accepted.

Consequently, to the extent the facts admitted by defendants in their guilty pleas satisfy the elements of a fraudulent violation of § 1592, defendants may be collaterally estopped from denying liability under § 1592. Defendants claim there is a lack of identity of issues since the elements of § 1001 and § 1592 differ in three respects: (1) the standard of materiality; (2) the standard of intent; and (3) the "entered by means of" requirement.

Defendants maintain that the Information to which they pleaded guilty did not establish the materiality of the statements referred to therein for purposes of § 1592 because there is no allegation that the statements had any impact upon a decision made by *Customs.* The Information charges that defendants sought to evade the TPM which would affect a decision by *Commerce* as to whether an antidumping duty investigation should be initiated. Under § 1001, courts have interpreted a material false statement to be "one that

[2] The Court specifically stated "a determination that the search of Prosise's apartment was illegal would have been entirely irrelevant in the context of the guilty plea proceeding." *Id.*

is *capable* of affecting or influencing the exercise of a government function." *United States* v. *Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980), *cert. denied*, 447 U.S. 907 (1980) (emphasis in original) (citations omitted); *United States* v. *Valdez*, 594 F.2d 725, 728 (9th Cir. 1979). There need not be any pecuniary loss involved but merely a potential impairment of a government agency's functioning. 610 F.2d at 1278 (citations omitted).

This Court has adopted a similar definition of materiality in the context of § 1592 proceedings, "the test is whether [the false statement] has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *United States* v. *Rockwell Int'l Corp.*, 10 CIT ——, ——, 628 F. Supp. 206, 210 (1986). Customs itself has defined materiality within the scope of § 1592 by stating: "[a] document, statement, act, or omission is material if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping" duty statute. 19 C.F.R. Part 171, App. B(A) (1984). In *Rockwell*, where components were actually of foreign origin but identified to be domestic, the court held "that the measurement of the materiality of the false statement is its potential impact upon Customs determination of the correct duty for the imported merchandise." 10 CIT at ——, 628 F. Supp. at 210. The falsity was material irrespective of whether the United States might be deprived of any lawful duty (if defendant had overestimated duties of a separate component). *Id.*

Defendants claim Customs merely collects the data from SSSIs and makes no substantive decision which could have been potentially affected by these statements. Accordingly, since the Information did not charge that the false statements influenced the assessment of duties, or the conditions of entry, and since it only alleged defendants sought to avoid a potential antidumping investigation but not antidumping duties, it cannot be material. The Court disagrees. The statements involved here were material. It is irrelevant that the United States may not be deprived of any lawful duties because defendants overstated the value of the merchandise. *See id.* Initially, the question of materiality is one of law. *Id.* at ——, 628 F. Supp. at 209–10. Therefore, the Court must evaluate the facts in the Information to which defendants pleaded guilty to determine whether they satisfy the materiality standard under § 1592. Defendants admitted that their knowingly, willful false statements made to Customs and Commerce were to avoid the TPM and a possible antidumping investigation. It is beyond peradventure that Customs' responsibility in gathering accurate information from the SSSIs was a key component in effective implementation of the TPM. The Court is of the opinion that in the context of a remedial statute such as § 1592, as distinct from a criminal statute where a narrow construction of terms may be warranted, actions taken to avoid a

possible antidumping *investigation* necessarily seek to avoid the imposition of possible antidumping duties.

While defendants are correct in that not every false statement submitted to Customs will support a violation under § 1592, *United States* v. *Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978), the statements here were so intertwined with Customs responsibility in the import process that they are material. The value of the steel in the SSSIs is the basis upon which Customs compares the trigger price. Even though Commerce decides the appropriateness of initiating an antidumping investigation, it cannot be gainsaid that the analysis performed by Customs in reliance on information by the importer is the crux of Commerce's subsequent decision. The importance of accurate collection of import data is not only relevant to proper implementation of the TPM but also mandated by statute. *See* 19 U.S.C. § 1481(a). "[T]he purpose of section 1592 was 'to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws.'" *United States* v. *F.A.G. Bearings, Ltd.*, 8 CIT 294, 296, 598 F. Supp. 401, 403–04 (1984) (citing S. Rep. No. 778, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2211, 2229). Contrary to defendants' assertions, the Information need not mention these statutes for the Court to find that the *facts* outlined in the Information, which the defendants admitted, establish violations of Customs law.

Defendants next claim that fraudulent intent under § 1001 and § 1592 differ. The standard for a fraudulent violation under § 1592 is set forth in the Customs regulations:

> A violation is determined to be fraudulent if it results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence.

19 C.F.R. Part 171, Appendix B(B)(3). Defendants argue that the guilty pleas do not establish that they intended to defraud the revenue or that they violated any law of the United States.

Defendants rely on *Lichenstein* for the definition of fraud under § 1001: "[t]he statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but § 1001 does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit." 610 F.2d at 1276–77. Accordingly, defendants conclude that their guilty pleas do not establish fraud because under § 1001 there is no requirement of an intent to defraud as is present in § 1592, and defendants did not intend to violate any law because the TPM is not a law, but a policy.

The Court accepts defendants' first premise that the requisite *mens rea* for a violation under § 1001 may not prove fraud for purposes of § 1592 with reference to the intent to defraud. However, de-

fendants admitted that they "did knowingly, willfully, and unlawfully make and cause to be made a material false and fraudulent statement and representation on a [SSSI] (Form 5520)" with respect to each of the nine entries. *Plaintiff's Memorandum*, Attachment B at 6. This is the specific factual allegation to which defendants entered their guilty pleas. By admitting to this practice, the requisite fraudulent intent, *i.e.*, to violate the laws of the United States has been established. The TPM may have only been a policy designed to implement the antidumping laws, however, the Court has previously described how defendants' actions sought to avoid proper application of the dumping statute.

Defendants further claim that, under § 1592, the merchandise must be entered "by means of" the material false statement and this was not previously established by their guilty pleas because this requirement is not an element of § 1001. It is argued that the government's failure to prosecute defendants under 18 U.S.C. § 542, the criminal counterpart of 19 U.S.C. § 1592, clearly demonstrates that the government could not sustain a conviction under § 542, and thus cannot prove a violation under § 1592.[3] Defendants' argument was recently rejected in *United States* v. *Walter C. Loesche*, 12 CIT ——, 668 F. Supp. 649 (1988), wherein the court held:

> [T]he Government's choice initially to prosecute defendants under 18 U.S.C. § 1001, rather than under the special customs fraud provision of 18 U.S.C. § 542 is not relevant to the issues now before this court, because neither criminal statute can operate to preclude this civil action. The right to recover civil damages, in addition to the right of criminal recourse, is vested with the Government, and no special authorization to that effect need be contained in the criminal statute.
>
> * * * * * * *
>
> The Court grants the Government's motion for partial summary judgment and is not persuaded that there exists any material issue of facts which have to be tried.

Id. at ——, 688 F. Supp. at 651.

While the Court considers this case to be dispositive of the instant issue, a brief discussion of *United States* v. *Teraoka*, 669 F.2d 577 (9th Cir. 1982) is merited, as defendants have relied heavily on that decision to support their argument. *Teraoka* involved a fraudulent scheme, practically mirroring that presented herein, where the TPM was sought to be avoided by fraudulent inflation of the

[3] 18 U.S.C. § 542 provides:

§ 542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties;

purchase price. The court construed the "by means of" language in § 542 to encompass only those false statements bearing significance to the actual importation and admission of the goods. *Id.* at 579 n.3. *Teraoka* held that the incorrect invoice prices did not operate to deny the goods entry or affect the "terms upon which entrance is granted * * * [t]he TPM then has no effect whatsoever on importation." *Id.* at 579.

However, *Teraoka* has not been well received by this, or other courts construing § 1592. To the extent *Teraoka* implies that an entry is only accomplished "by means of" a false document where the entry would otherwise be restricted or prohibited, the courts have refused to engraft such a requirement on § 1592. *United States* v. *Ven-Fuel, Inc.*, 758 F.2d 741 (1st Cir. 1985); *United States* v. *F.A.G. Bearings Corp.*, 8 CIT 201, 615 F. Supp. 562 (1984); *United States* v. *F.A.G. Bearings, Ltd.*, 8 CIT 294, 598 F. Supp. 401 (1984). Application of *Teraoka* would emasculate the essential civil enforcement statute of § 1592. *F.A.G. Corp.*, 8 CIT at 209, 615 F. Supp. at 569; *Ven-Fuel*, 758 F.2d at 762. The bounds of § 1592 reach to false statements and practices in relation to lawfully imported merchandise. *See id.* The "by means of" false statement criteria has been satisfied where the false statement referred to *value*, origin, quantity, and price made in connection with the entry process. *F.A.G. Corp.*, 8 CIT at 209, 615 F. Supp. at 569. Thus, the "by means of" criterion has been satisfied.

Finally, defendants contend that § 1592 requires a trial *de novo*, which defendants would be denied if collateral estoppel applies. However, this requirement merely references the applicable standard of review, which means the Court finds the facts as opposed to referring to those on the agency record. If the Court determines the facts, as admitted in the guilty plea, satisfy the elements of § 1592 the Court has not abrogated its fact finding function. *See Otherson*, 711 F.2d at 272–73 (collateral estoppel invoked in subsequent civil action notwithstanding that adverse party would have been entitled to a hearing).

Defendants were represented by counsel in the previous criminal proceeding which involved serious significant charges. The Court finds defendants would have had ample incentive to litigate these issues previously. No inequity in applying collateral estoppel is manifest and defendants have not offered any compelling equitable or factual circumstances to indicate otherwise. A copy of the plea agreement indicates that counsel negotiated the plea on the basis of the corporate defendants wherein defendants agreed to admit to the factual allegations underlying the criminal violations.

Defendants also maintain that their affirmative defenses bar judgment for plaintiff. Defendants' second, third, and fourth defenses relate to the question of materiality and the "by means of" language in § 1592. As the Court has previously addressed these contentions, no further discussion is warranted and the conclusion

thus mandated is that they fail in their attempt to defeat recovery for plaintiff.

Defendants' first defense asserts that this action is barred by the statute of limitations. Defendants' fifth defense alleges that the government precluded defendants' opportunity for fair and impartial mitigation proceedings which should prevent plaintiff from recovery.

Plaintiff has moved to strike these defenses as insufficient. The untimely filing of this motion is in issue, since USCIT R. 12(f) imposes a 20-day time limit after service of the answer to file such a motion and plaintiff's motion was brought after the 20-day limit. However, a motion to strike may be considered even though submitted beyond the 20-day period.

> In the case of a challenge to the sufficiency of a defense, whether it is advanced in a timely or untimely pre-answer motion under rule 12(f) * * * or is made in a simultaneous motion to strike, probably is of little practical importance. That is because Rule 12(h)(2) permits an "objection of failure to state a legal defense" to be asserted "by motion for judgment on the pleadings, or at the trial on the merits," which provides a method for attack even if the time for moving to strike under Rule 12(f) has expired.

5 Wright & Miller Federal Practice & Procedure § 1380, at 786 (1969 & Supp. 1987). The Court will, therefore, consider plaintiff's motion to strike.

Broad discretion is granted to the Court in determining whether to grant a motion to strike. *Beker Industries Corp.* v. *United States*, 7 CIT 199, 200, 585 F. Supp. 663, 665 (1984). These motions are not generally favored by the courts because they are a drastic remedy. *Id.*

In regard to the first affirmative defense asserted by defendants, the investigation giving rise to this civil action was suspended pending resolution of the criminal case. However, the time limit for commencing this action was not tolled by that suspension. Correspondingly, defendants executed voluntary waivers of the statute of limitations as the parties preferred that a resolution be reached on the administrative rather than judicial level. On March 8, 1985, defendants' counsel executed waivers of the statute of limitations for a period of one year from that date. The substance of that document indicates:

> This waiver is made knowingly and voluntarily by Daewoo International (America) Corporation [and Daewoo Industrial Company, Ltd. (Daewoo Corporation)] in order that said party might obtain the benefits of the orderly continuation of administrative proceedings currently being conducted by the United States Customs Service.

Plaintiff's Memorandum in Support of its Motion to Strike, Collective Exhibit A. Identical waivers executed on December 6, 1985 extended the period through March 7, 1987. *Id.*

Settlement negotiations between the parties proceeded from the latter part of 1985 through early 1986. Negotiating on behalf of defendants were defendants' attorney James Lundquist, and former presidential assistant, Michael K. Deaver, retained as consultant. *See also* Affidavit of James H. Lundquist at 2. The amount of the penalty issued against defendants then was $34.5 million.

After several offers were refused, in April 1986, a proposed settlement in the amount of $12 million was prepared, which was initialed by defendants' counsel and an attorney advisor from the Customs Service. *Id.*at 5; *see also Affidavits of Alfred R. DeAngelus, James H. Lundquist and Dae-Soo Lee Submitted in Opposition to Plaintiff's Motions to Strike Defendants' First, Fourth and Fifth Defenses,* Exhibit C (hereinafter "*Affidavits in Opposition*"). Immediately thereafter, a formal settlement offer by defendants was submitted to the Assistant Secretary of the Treasury for Enforcement, the official authorized to accept such offers. *Id.*, Exhibit D. Concurrently, defendants tendered a check for $2 million and a promissory note for the remainder in accordance with 19 C.F.R. § 161.5. *Id.*

However, the settlement agreement was never executed on behalf of the government. During the period after the settlement offer was prepared, the lobbying activities of Michael Deaver came under scrutiny by the House Energy and Commerce Committee, chaired by Representative John Dingell. Subsequently, the $12 million settlement agreement was rejected and the check was returned. A letter, dated June 2, 1985, by Alfred R. DeAngelus, Deputy Commissioner of Customs, responded to defendants' offer:

> As you know, there is a risk for the Government, and the alleged violator, in entering into settlement negotiations while a section 1592 investigation is ongoing. For the Government, the earlier a settlement agreement is reached, the greater the likelihood that the alleged violator will escape any increased liability because of the possible discovery of additional violations. For the alleged violator, the later a settlement agreement is reached, the greater the likelihood that the alleged violator will incur increased liability because of the possible discovery of additional violations.
>
> Customs rejection of your previous $11 million offer, and your pending offer of $12 million was based upon known violations and potential violations. The $12 million figure was raised by you during the first part of February, 1986. On February 28, 1986, additional violations became known to us. The $12 million offer was not executed and submitted until April 4, 1986. Therefore, we firmly believe that these subsequently discovered

violations must be considered in arriving at a fair and equitable settlement for the Government.

Affidavits in Opposition, Exhibit I.

Thus, although it is alleged that Customs discovered more violations which would justify refusing the offer, defendants claim the real reason Customs rejected the settlement was the threat of congressional hearings on the propriety of any agreement where Michael Deaver had intervened. As this relates to the statute of limitations defense, defendants assert that the waivers implied the government would negotiate in good faith, but by repudiating the agreement because of improper congressional influence, the government acted in bad faith and, therefore, the waivers were null and void. In support of their allegations, defendants have submitted an affidavit from Alfred DeAngelus, which plaintiff has moved to strike.

It is the waiver itself which must be analyzed to determine whether it is enforceable. These documents were not conditioned upon a settlement being reached. The waivers iterate their purpose: to "obtain the orderly continuation of administrative proceedings currently being conducted by the Customs Service." *Plaintiff's Motion to Strike and Reply in Support of its Motion for Partial Judgment on the Pleadings*, Collective Ex. A. Had defendants not executed these waivers, the government would have been within its rights to commence this action at an earlier date, before the expiration of the statute of limitations. There is no legal obligation on the part of the government to settle the case. 19 U.S.C. § 1617 (1982) authorizes the Secretary of the Treasury to compromise claims under certain situations. 19 C.F.R. § 161.5, the implementing regulation, requires that the deposit be tendered with the offer and contemplates return of the money if the offer is rejected. It was clearly a voluntary action by both parties to enter into negotiation, with no assurance by both parties to enter into negotiation, with no assurance of the outcome. Therefore, the Court will not focus on why the settlement was not accepted or whether Customs refusal to accept the offer was due to Congressman Dingell's investigation. *See Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 69 CCPA 96, 673 F.2d 1254 (1982), *cert. denied*, 459 U.S. 943 (1982) (settlement agreement not within scope of judicial review except to the extent that procedural violations of § 1617 are subject to judicial review). The Court is concerned only with the knowing, voluntariness of the waiver which is not disputed, and which was executed by corporate defendants' counsel with defendants' authorization. Therefore, the statute of limitations defense is not sufficient as a matter of law.

Defendants additionally claim that they were denied fair and impartial mitigation proceedings as a result of this improper influence. As plaintiff submits, the only administrative proceedings mandated by § 1592 is the mitigation process outlined in 19 U.S.C.

§ 1618 (1982 & Supp. IV 1986). Discretion rests with the Secretary of the Treasury as to whether mitigation of penalties is warranted. Once the settlement negotiations were aborted, Customs ultimately issued penalty notices totalling approximately $162 million. Defendants pursued their administrative remedies by filing petitions for mitigation. Customs and Treasury did mitigate the penalty to $110 million, which represented 80% of the dutiable value of the merchandise. Defendants allege that the mitigation process was tainted by the prior political interference exerted by congressional pressure, thus, the mitigation decision was not based on the merits of their petition. Defendants contend that the $110 million mitigated penalty in comparison to the $12 million figure, which was previously deemed by Customs officials a satisfactory compromise of defendants' liability, is evidence of the improper influence exerted on Customs.

While it is abundantly clear that the mental process of the Secretary may not be probed to ascertain motives, the Secretary's exercise of its discretion is not boundless. *Montgomery Ward,* 69 CCPA at 109, 673 F.2d at 1263 (citing *United States* v. *Morgan,* 313 U.S. 409 (1941)). Rather, the Court is empowered to review whether procedural irregularity violative of statutory or regulatory requirements, or as a result of impermissible influence, occasioned the agency's decision. *Local 2855, AFGE (AFL–CIO)* v. *United States,* 602 F.2d 574 (3d Cir. 1979). If congressional pressure, even in part, forms the basis for the Secretary's decision, it is invalid, since the Secretary's decision must be based solely on those criteria statutorily outlined in the statute. *Sierra Club* v. *Costle,* 657 F.2d 298, 408–09 (D.C. Cir. 1981). Political pressure exercised by a member of Congress may compromise the appearance of impartiality. *Koniag, Inc., the Village of Uyak* v. *Andrus,* 580 F.2d 601, 610 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1052 (1978). However, the mitigated amount representing 80% of the claim is not *per se* conclusive of undue influence. *See* 19 C.F.R. Part 171, App. B(D)(2)(b) (for fraudulent non-revenue loss violations penalty shall be mitigated from 50–80% of dutiable value).

The Court does not find it necessary to strike this defense or the DeAngelus affidavit. While defendants presume that an alleged impartial mitigation process should result in dismissing the § 1592 action to collect the assessed penalties, the Court does not concur. In the Court's view, these issues go to the amount of mitigation of any such penalty. The allegations addressing the impartiality of the mitigation process do not attack the underlying violation. Since the amount of any penalty to be assessed shall be determined by the Court, whether at trial or otherwise, the concerns relating to the mitigation procedure may be voiced at that time. However, to reiterate, this defense does not preclude granting partial judgment on the pleadings for plaintiff.

CONCLUSION

Plaintiff's motion for partial judgment on the pleadings as to the nine entries is granted since as a matter of law, defendants' guilty pleas in the prior criminal action have established all the elements of a violation of § 1592 as to these entries. Defendants' affirmative defenses do not defeat that judgment. The statute of limitations defense is not sufficient as defendants executed a waiver of the statute of limitations which did not obligate Customs to settle the case. These waivers were not rendered null and void because Customs would not execute the settlement agreement. The waivers were conditioned upon the orderly continuation of the administrative process, but clearly Customs was never compelled to accept any settlement offer. Defendants' affirmative defense which asserts that improper congressional pressure tainted the mitigation process does not invalidate the fact that a violation of § 1592 has been established. Instead, it is properly directed at the amount of penalty to be assessed. As the Court will ultimately determine that issue, there is no need to strike that defense or the DeAngelus affidavit submitted in support thereof.

(Slip Op. 88–131)

SAUDI IRON AND STEEL CO. (HADEED), PLAINTIFF *v.* UNITED STATES, DEFENDANT, GEORGETOWN STEEL CORP., ET AL., DEFENDANT-INTERVENORS

GEORGETOWN STEEL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, SAUDI IRON AND STEEL CO. (HADEED), DEFENDANT-INTERVENOR

Consolidated Court No. 86–03–00283

Before DICARLO, *Judge.*

Commerce's use of a "rate of return shortfall methodology" is affirmed following a second remand.

[Action dismissed.]

(Decided October 5, 1988)

Millier & Chevalier, Chartered (*Homer E. Moyer, Jr., Joanne Thomas Asbill* and *Christopher C. Gould*) for Saudi Iron and Steel Company (HADEED).

Fried, Frank, Harris, Shriver & Jacobson (*David E. Birenbaum* and *Alan Kashdan*) for Atlantic Steel Corporation.

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr., Robert C. Weissler* and *Alan H. Price*) for Georgetown Steel Corporation, Northstar Steel Texas, Inc. and Raritan River Steel Company.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Commerce (*Matthew Jaffe*) for defendant.

DiCarlo, *Judge:* This action is before the Court after a second remand to the International Trade Administration of the United States Department of Commerce (Commerce) in an action challenging Commerce's findings in *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod From Saudi Arabia,* 51 Fed. Reg. 4206 (Feb. 3, 1986). The Court now affirms Commerce's use of a rate of return shortfall methodology.

Background

Section 771(5)(B)(i) of the Tariff Act of 1930, as amended, defines a domestic subsidy, in part, as "[t]he provision of capital * * * on terms inconsistent with commercial considerations." 19 U.S.C. § 1677(5)(B)(i) (1982). In its first opinion in this case, *Saudi Iron and Steel Co. (HADEED)* v. *United States,* 11 CIT ——, 675 F. Supp. 1362, 1371–73, (1987) (*Saudi I*), the Court found it sufficiently reasonable for Commerce to determine that the transfer of the Jeddah Steel Rolling Company (SULB) to the Saudi Iron and Steel Company (HADEED) constituted a "provision of capital * * * inconsistent with commercial considerations." However, in order to be countervailable, a subsidy must also be found to be "paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise." 19 U.S.C. § 1677(5)(B). *Saudi I* remanded for Commerce to explain how the transfer of SULB, which produced steel reinforcing bar, to HADEED, which produced billets and steel wire rod, benefitted—either directly or indirectly—HADEED's production of steel wire rod, the product under investigation.

Commerce explained that HADEED benefitted indirectly from its acquisition of SULB by illustrating how the acquisition of SULB permitted HADEED's steel mill to sustain a guaranteed high level of capacity utilization in its production of billets which, in turn, afforded HADEED a guaranteed opportunity to control internally its production costs and sale price for carbon steel wire rod. In the second opinion in this case, the Court found that substantial evidence on the administrative record supported Commerce's findings. *Saudi Iron and Steel Co. (HADEED)* v. *United States,* 12 CIT ——, 686 F. Supp. 914 (1988) (*Saudi II*). The Court remanded a second time, however, because Commerce had calculated the benefit conferred by using the "rate of return shortfall methodology" that was announced in the Subsidies Appendix. *Id.* at ——, 686 F. Supp. at 918. *See Subsidies Appendix, Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 49 Fed. Reg. 18,006, 18,020 (Apr. 26, 1984). *Saudi II* found that Commerce's reliance on the Subsidies Appendix as a fixed rule independent of the facts of record had been disallowed in *Ipsco, Inc.* v. *United States,* 12 CIT ——, 687 F. Supp. 614, 626–31 (1988). Because Commerce failed to

provide a basis other than the *Subsidies Appendix* for its decision to use the rate of return shortfall methodology in calculating HADEED's benefit, the Court remanded for Commerce to reconsider the benefit and explain after reconsideration the reasons behind the methodology employed. *Saudi II,* 12 CIT at ——, 686 F. Supp. at 919.

Discussion

In its second remand determination, Commerce has reconsidered the question of what methodology should be used to calculate the indirect benefit of the subsidy to HADEED and redetermined that the rate-of-return shortfall methodology is an appropriate and reasonable method for measuring the extent to which Hadeed's acquisition of SULB is inconsistent with commercial considerations. Hadeed contends that this methodology is appropriate because it bears no relation to the reasons which Commerce gave for its finding that HADEED benefitted indirectly from the acquisition of SULB.

As the second remand determination explains, Commerce has found that an equity infusion benefits an entire company, not just certain parts of it. *Second Remand Determination* at 5–6. Commerce determined that the domestic subsidy (i.e., the acquisition of SULB) was clearly linked to the production of carbon steel wire rod. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod from Saudi Arabia,* 51 Fed. Reg. 4206, 4209–10 (Feb. 3, 1986); *Remand Determination* at 2–9; *Second Remand Determination* at 5–7. Commerce determined after the second remand that once a firm's net capital stock is increased, the whole structure of the company changes:

> its profitability and leverage ratios change; its earnings potential changes: its prospects for attracting new investment or contracting new debt change. In effect, a new company is created * * *. The effect * * * of HADEED's acquisition of SULB is reflected in the rate of return on equity that the "new" HADEED will now generate. The shares acquired in exchange for SULB will earn a return based on the operation of the whole company, not just on the production of rebar [steel reinforcing bar] or wire rod. Investors receive a return on their investment only if the whole company earns a profit, not if just one product of a company earns a profit. From all points of view, equity is inextricably tied to the performance of the whole company. Therefore, *any infusion of equity, no matter what the form, must be allocated over a company's total sales.*

Second Remand Determination at 6–7 (emphasis added). Commerce's determination is consistent with determinations Commerce made in *Industrial Nitrocellulose from France; Final Results of Countervailing Duty Administrative Review,* 52 Fed. Reg. 833 (Jan. 9, 1987), and in *Stainless Steel Plate from the United Kingdom; Fi-*

nal Results of Countervailing Duty Administrative Review, 51 Fed. Reg. 44,656 (Dec. 11, 1986).

In its first remand determination, Commerce explained how the acquisition of SULB is tied to HADEED's manufacture, production, or export of carbon steel wire rod. In its second remand determination, Commerce explained how the rate of return shortfall methodology best measures the extent to which acquisition of SULB is inconsistent with commercial considerations.

COMMERCE'S RATE OF RETURN SHORTFALL METHODOLOGY

Where there is no market-determined price for an infusion of equity, Commerce determines whether the government infusion is inconsistent with commercial considerations by first assessing the company's prospects at the time the government equity infusions were made to determine whether the company is "equityworthy," i.e., whether it is a reasonable investment from the standpoint of a reasonable private investor. *Second Remand Determination* at 3. To be equityworthy, a company must show an ability to generate a reasonable rate of return within a reasonable period of time. *Id.* If the company is equityworthy, Commerce concludes that the equity infusion is consistent with commercial considerations and is not a subsidy because a reasonable private investor would have invested in the company. *Id.* at 4. If the company is not equityworthy, Commerce looks at what the company would have had to "pay" for the equity infusion, absent government intervention, in order to determine whether a reasonable private investor would have invested in the company. *Id.*

Under Commerce's methodology, the measure of what a firm "pays" for equity is its rate of return on equity. *Id.* The rate of return on equity reflects the price the firm must offer to attract equity, any dividends paid, and changes in the company's retained earnings and net worth. *Id.* Commerce compares the company's rate of return with the national average rate of return on equity on the rationale that a reasonable private investor would expect investment returns to at least equal the national average rate of return. *Id.* If the firm's rate of return is equal to or greater than this national average, Commerce will not find a subsidy because the firm's rate of return would be consistent with commercial considerations. *Id.* If the firm's rate of return is below the national average, the "rate of return shortfall," Commerce finds a subsity equal to the difference between what the firm actually paid on its equity and what an average firm in the country paid. *Id.* at 4–5. Once Commerce determines that a firm is not equityworthy and that there is a shortfall, Commerce measures the benefit by multiplying the company's rate of return shortfall by the value of the government's equity infusion. *Id.* at 5.

HADEED makes no argument in direct opposition to the methodology Commerce utilized and fails to offer an alternative to it.

HADEED's only argument is that the methodology is wrong because it bears no relation to the "economies of scale" rationale upon which Commerce based (and the Court sustained) its determination that HADEED benefitted indirectly from the SULB transfer. Presumably, HADEED would calculate the subsidy as the value of economies of scale in billet production. No record data exists however concerning HADEED's billet production prior to 1982, since HADEED did not produce billets then. As the Court recognized in *Saudi II*, it would be impossible to calculate the indirect benefit to HADEED of SULB's transfer by attempting to calculate the "reduced billed per-unit costs * * * because * * * no data on actual billet production or billet cost per unit as of 1982 exists to compare to HADEED's capacity utilization after acquiring SULB." *Saudi II*, 12 CIT at ——, 686 F. Supp. at 917.

Even if Commerce could have calculated the value of the economies of scale, Commerce states that HADEED fails to recognize that the beneficial economies of scale which resulted from its acquisition of SULB do not constitute the domestic subsidy bestowed. Commerce found that the subsidy bestowed was the transfer of SULB to HADEED, and it is the degree to which this provision of capital is made on terms inconsistent with commercial considerations that is countervailable. As Commerce explained in the second remand determination, "[t]he issue of economies of sale discussed at length in our first Remand Determination merely illustrated how the acquisition of SULB affected *every aspect* of the 'new' HADEED." *Second Remand Determination* at 6 (emphasis added). Commerce determined after the second remand that its rate of return shortfall methodology is an appropriate methodology to employ because it measures the extent to which the equity infusion is allocated over the company's total sales. Commerce thus determined that the rate of return shortfall methodology was appropriate to measure HADEED's benefit from the transfer of SULB on terms inconsistent with commercial considerations.

Commerce noted that government provision of equity does not *per se* confer a subsidy. The fact that the transfer of SULB to HADEED constituted a provision of capital, or that this transfer indirectly benefited HADEED's production of carbon steel wire rod, does not by itself establish a countervailable benefit. It is the degree to which this transfer took place on terms inconsistent with commercial considerations that make it countervailable.

Conclusion

Having reviewed Commerce's second remand determination and explanation of its rate of return shortfall methodology, the Court finds that Commerce's methodology is a reasonable means of assessing the net benefit received as a result of the subsidy.

As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology."

RSI (India) Pvt., Ltd. v. *United States,* 12 CIT ——, 687 F. Supp. 605, 614 (1988); *Ceramica Regiomontana, S.A.* v. *United States,* 10 CIT ——, 636 F. Supp. 961, 967 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987). The Court affirms Commerce's calculation of the benefit at 0.53 percent ad valorem. The action is dismissed.

(Slip Op. 88-132)

UNITED STATES CANE SUGAR REFINERS ASSOCIATION, ET AL., PLAINTIFFS *v.* UNITED STATES,. DEFENDANTS

Court No. 88-09-00740

Before WATSON, *Judge.*

[Defendants' motion to dismiss for lack of jurisdiction granted.]

The opening and distribution of a quota five months after plaintiffs have initiated petitions under 19 U.S.C. § 1516 designed to change the classification of competing imported products and make them ineligible for the quota does not indicate the manifest inadequacy of the petition process and the specific form of judicial review of its results provided under 18 U.S.C. § 2631(b). Accordingly, plaintiffs cannot invoke the residual jurisdiction of this Court under 28 U.S.C. § 1581(i), to challenge the classification involved, and to obtain extraordinary remedies prior to exhausting the normal administrative procedures.

(Dated October 6, 1988)

Wilmer, Cutler & Pickering, (*A. Douglas Melamed, Robert C. Cassidy Jr.* and *Eric R. Markus* of counsel) for the plaintiffs.

John R. Bolton, Assistant Attorney General (*Joseph I. Liebman,* Attorney in Charge, International Trade Field Office and *John J. Mahon,* Commercial Litigation Branch) for defendants.

Steptoe & Johnson (*W. George Grandison* and *Stephen D. Ramsey* of counsel) for defendant intervenors Redpath Sugars, Atlantic Sugars, Ltd. and Canadian Sugar Institute.

Miller and Chevalier (*Grant D. Aldonas* and *Homer E. Moyer, Jr.,* of counsel) for defendant intervenor Allen Sugar Co.

ORDER

WATSON, *Judge:* Following a motion by the government, this action was dismissed for lack of jurisdiction at a hearing held on October 4, 1988. This opinion sets out the background of the action and gives the reasons for the dismissal.

The plaintiffs are domestic producers of cane sugar and beet sugar. In April of 1988 plaintiffs petitioned the Secretary of the Treas-

ury under Section 516 of the Tariff Act of 1930, (19 U.S.C. § 1516) to alter the classification as "edible preparations" under Item 183.05 of the Tariff Schedules of the United States ("TSUS") of certain retail-packaged blends of imported granulated or crystalline sugar and dextrose which contained 80 percent or more of sugar ("high sugar blends") and any blends of granulated or crystalline sugar and dextrose which contained approximately 65 percent sugar ("65/35 sugar blends"). The result sought by the petitioners would have the effect of removing the importations from eligibility for the 84,000 ton annual quota set by Item 958.18.

It should be noted that this dispute arises in connection with sugar, a product which, in various forms, is the subject of quotas imposed under authority of the President, either by operation of Headnote 2 of Subpart A of Part 10 of Schedule 1 of the TSUS (19 U.S.C. § 1202) or pursuant to determinations made under Section 22 of the Agricultural Adjustment Act of 1933, as amended, 7 U.S.C. § 624.

As of September 30, 1988 no action had been taken on the petitions. On that day plaintiffs obtained a temporary restraining order from this Court, based on their representations that the new 84,000 ton quota under Item 958.18 was due to open on October 1, 1988; that no action had been taken on the petitions; that an erroneous classification would allow approximately 84,000 tons of imported product to enter the United States, and that the result would be to deprive the U.S. sugar producers of revenues of approximately $50 million and thereby irreparably injure them. The Court set October 4, 1988 as the date for a hearing on the issuance of a preliminary injunction. In the interim the government filed a motion to dismiss the action which was given priority at the hearing and which resulted in the dismissal of the action.

The dismissal of this action is required because its jurisdictional basis, namely, this Court's general, residual jurisdiction of 28 U.S.C. § 1581(i) is not available for matters in which a party has an administrative remedy which must be exhausted and a specific jurisdictional basis for obtaining judicial review thereafter. *National Corn Growers Ass'n* v. *Baker,* 840 F.2d 1547 (Fed. Cir. 1988). In the case of a domestic petitioner seeking to change the classification of competing imported merchandise the only way to escape the necessity of exhausting the remedy provided under 19 U.S.C. § 1516 and avoiding the prescribed method of obtaining judicial review under 28 U.S.C. § 2631(b) would be to show that the normal methods are manifestly inadequate and incapable of providing meaningful relief. *U.S. Cane Sugar Refiners' Assoc.* v. *Black,* 683 F.2d 399, 402 n.5 (Fed. Cir. 1982).[1]

This brings us to the crux of the jurisdictional deficiency in this case. No one can deny that the plaintiffs will be adversely affected

[1] The alternative claim for jurisdiction under 28 U.S.C. § 1581(h) was entirely out of the question because standing to bring that action challenging a classification ruling prior to importation is limited in 28 U.S.C. § 2631(h), roughly speaking, to the prospective importer of the goods in dispute.

by the continued availability of an 84,000 ton quota to a product which they claim is eligible for the quota only because of an erroneous tariff classification. But a distinction must be drawn between those injuries which arise from the manifest inadequacy of the administrative process and those injuries which arise simply because a particular administrative process was intended to have only a prospective effect and therefore allows adverse effects to occur during the pendency of the proceeding. This is a distinction between manifest inadequacy and inherent or unavoidable imperfection.

Section 516, the method by which American producers can challenge the tariff classification of competing imported merchandise clearly provides in its subsection (b), (19 U.S.C. § 1516(b)) that a decision granting a petition does not begin to affect imported merchandise until after a notice of the determination is published. This means that in all proceedings in which petitioners are seeking to change the classification of competing imported merchandise they must endure the effect of the competing imports during the pendency of the administrative proceeding. Plaintiffs' predicament, although it is dramatic because the adverse effect for an entire year is apparently achieved in one day, is, in principal, no different from that of the petitioner who might have to endure a period of proceeding during which competing importations are regularly entered, or conceivably might have to face enormous surges in the volume of the imported product during that time. In all these situations the potential for meaningful relief still exists for the period following a favorable determination and that appears to be enough to keep the administrative remedy from being manifestly inadequate.

This analysis is not intended to eliminate the possibility that in another case different facts might justify a conclusion that the normal operation of Section 516 procedures would be manifestly inadequate. Here the Court simply finds that the fact that this petition was not resolved in time to affect the first subsequent quota distribution has not demonstrated the manifest inadequacy of the petition process. For this reason, the Court's residual jurisdiction under 28 U.S.C. § 1581(i) was not properly invoked and the action had to be dismissed for lack of jurisdiction.

ABSTRACTED CLASSIFIC

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C88/154	Re, C.J. September 1, 1988	Leblond Makino Machine Co.	85-8-01044	Merchandise denied duty-free entry since plaintiff had not met the 35% foreign manufacturer requirement required for GSP status
C88/155	Rao, J. September 1, 1988	St. Regis Paper Co.	79-8-01260	Item 252.90 10%
C88/156	Rao, J. September 1, 1988	St. Regis Paper Co.	80-5-00729	Item 252.90 10%
C88/157	Rao, J. September 1, 1988	St. Regis Paper Co.	80-11-00001	Item 252.90 10% or 9.3%
C88/158	Rao, J. September 1, 1988	St. Regis Paper Co.	81-11-01506	Item 252.90 9.3%
C88/159	Rao, J. September 1, 1988	St. Regis Paper Co.	82-2-00177	Item 252.90 8.5%
C88/160	Rao, J. September 1, 1988	St. Regis Paper Co.	82-9-01325	Item 252.90 8.5%
C88/161	Rao, J. September 1, 1988	St. Regis Paper Co.	82-11-01534	Item 252.90 7.8%

CATION DECISIONS

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Free of duty pursuant to GSP	Agreed statement of facts	Baltimore 15 and 19 inch lathes
Item 252.05 1%	St. Regis Paper Co. v. U.S., S.O. 87-97	New York Black calendered paper
Item 252.05 1%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
Item 252.05 0.9%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
Item 252.05 0.9%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
Item 252.05 0.8%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
Item 252.05 0.8%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
Item 252.05 0.6%	St. Regis Paper Co. v. U.S., S.O. 87-97	New York Black calendered paper

C88/162	Rao, J. September 1, 1988	St. Regis Paper Co.	83-7-01003	Item 252.90 7%
C88/163	Carman, J. September 2, 1988	Mattel, Inc.	80-9-01495	Item 737.22 17.5%
C88/164	Watson, J. September 6, 1988	Washington Int'l Ins. Co.	86-2-00163	Item 320.36, 320.40, 320.44 Various rates
C88/165	Restani, J. September 6, 1988	A.N. Deringer, Inc.	78-1-00006	Item 357.90, 657.20, 657.25 Various rates
C88/166	Restani, J. September 6, 1988	A.N. Deringer, Inc.	80-5-00749	Item 357.90, 657.20, 657.25 Various rates
C88/167	Restani, J. September 6, 1988	Uniroyal, Inc.	78-5-00917	Item 357.90, 657.20, 657.25 Various rates
C88/168	Restani, J. September 6, 1988	Uniroyal, Inc.	78-10-01863	Item 357.90, 657.20, 657.25 Various rates
C88/169	Restani, J. September 6, 1988	Uniroyal, Inc.	81-12-01686	Item 357.90, 657.20, 657.25 Various rates
C88/170	Restani, J. September 8, 1988	A.N. Deringer, Inc.	78-1-00012	Item 357.90, 657.20, 657.25 Various rates
C88/171	Restani, J. September 8, 1988	A.N. Deringer, Inc.	78-1-00181	Item 357.90, 657.20, 657.25 Various rates
C88/172	Restani, J. September 8, 1988	Uniroyal, Inc.	79-6-01024	Item 357.90, 657.20, 657.25 Various rates
C88/173	Restani, J. September 8, 1988	Uniroyal, Inc.	79-7-01203	Item 357.90, 657.20, 657.25 Various rates

	Item 252.05 0.5%	St. Regis Paper Co. v. U.S., S.O. 87-97	Cleveland Black calendered paper
	Item A774.60 Free of duty Item 774.60 8.5%	Mattel, Inc. v. U.S., S.O. 84-133	New York Base stands and leg holders
	Item 321.17 Various rates	Agreed statement of facts	Savannah Bleached cotton sheeting
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose

ABSTRACTED CLASSIFICATIO

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C88/174	Restani, J. September 8, 1988	Uniroyal, Inc.	79-8-01291	Item 357.90, 657.20, 657.25 Various rates
C88/175	Restani, J. September 8, 1988	Uniroyal, Inc.	79-9-01405	Item 357.90, 657.20, 657.25 Various rates
C88/176	Restani, J. September 8, 1988	Uniroyal, Inc.	79-11-01712	Item 357.90, 657.20, 657.25 Various rates
C88/177	Restani, J. September 8, 1988	Uniroyal, Inc.	79-11-01713	Item 357.90, 657.20, 657.25 Various rates
C88/178	Restani, J. September 8, 1988	Uniroyal, Inc.	80-10-01736	Item 357.90, 657.20, 657.25 Various rates
C88/179	Restani, J. September 8, 1988	Uniroyal, Inc.	80-10-01781	Item 357.90, 657.20, 657.25 Various rates
C88/180	Restani, J. September 8, 1988	Uniroyal, Inc.	82-7-00999	Item 357.90, 657.20, 657.25 Various rates
C88/181	Restani, J. September 13, 1988	Uniroyal, Inc.	82-11-01576	Item 357.90, 657.20, 657.25 Various rates
C88/182	Watson, J September 19 1988	Marubeni America, Corp.	86-1-00101	Item 338.50 21.6%

ON DECISIONS — Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
e	Item No. and rate		
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
0,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
9,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
9,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
9,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
9,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
9,	Item 772.65 Various rates	Uniroyal, Inc. v. U.S., S.O. 85-94	Champlain-Rouses Pt. Rubber hose
	Merchandise withdrawn from warehouse for transportation and exportation to Canada is not subject to duty pursuant to 19 U.S.C. 1557(a)	Agreed statement of facts	New York Polyester fabrics

C88/183	Watson, J. September 29, 1988	C. Itoh & Co.	86-7-00904	Item 692.02 25%
C88/184	Watson, J. September 29, 1988	Nissho Iwai American Corp	88-8-00601	Item 376.54 or 376.5[illegible] 7.6% for parka shells Item 384.19, 384.2[illegible] or 381.23 30% for parka liners

	Item 692.20 4% for cargo boxes Item 772.51 4% for spare tires Item 692.32 3.9% for wheels Item 664.10 4.6% or 4.3% for jacks	Agreed statement of facts	Tacoma Cargo boxes, spare tires, wheels, and jacks
56 20	Item 376.54 or 376.56 Various rates for parka shells and parka liners	Agreed statement of facts	Portland Parka shells and parka liners

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